92-209

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MICHAEL STEEN,

Petitioner,

v.

JERRI LYNN THOMPSON, etc. and
JOSEPH DESHETRES,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court held that police officers performing discretionary functions are entitled to qualified immunity from damages liability so long as their conduct does not violate clearly established constitutional rights.

In this case, the Ninth Circuit denied petitioner Sgt. Michael Steen qualified immunity for his decision to order forcible entry into a motorcycle gang's clubhouse to serve a narcotics Search Warrant despite the following undisputed facts: Sgt. Steen reasonably feared armed resistance; the occupants were given premature warning of the police approach; and, prior to entry, the police waited 7-10 seconds after knocking and twice announcing their purpose. The questions presented are:

I.

Whether the Ninth Circuit erred in denying qualified immunity to Sgt. Steen when the amount of time the police must wait before forcible entry to execute a narcotics Search Warrant is not clearly established, particularly where the police reasonably fear armed resistance.

II.

Whether the Ninth Circuit erred in denying qualified immunity to Sgt. Steen when, in addition to facts stated in Question I, a premature warning was given of the police approach which required Sgt. Steen to make a split second decision to expedite entry based upon his belief that this changed circumstance heightened the danger to the police executing the narcotics Search Warrant.

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No. _____

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October Term, 1992

MICHAEL STEEN,

Petitioner,

v.

JERRI LYNN THOMPSON, etc. and
JOSEPH DESHETRES,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Michael Steen, by his attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals by Circuit Judges Schroeder, Reinhardt, and Kleinfeld is unsigned and unreported (App. 1-6). The opinion of the district court is unreported (App. 7-30).

JURISDICTION

The decision of the court of appeals was filed on April 2, 1992. The petition for rehearing was denied on June 3, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

California Penal Code § 1531 provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

STATEMENT OF THE CASE

Michael Steen is a sergeant in the Santa Rosa Police Department, Santa Rosa, California. Since 1983, he has been the supervisor of the City's special response team which serves Search Warrants on premises where there

are believed to be individuals who are armed or have a history of violence. (App. 99.)

The Federal Bureau of Investigation has provided Sgt. Steen with extensive training regarding the proper execution of Search Warrants, including F.B.I. Agent Benedict J. Tisa's instruction regarding the tactics to be employed by police so as to successfully execute Search Warrants while minimizing injury to police, bystanders and others who may be encountered. F.B.I. Agent Tisa trained Sgt. Steen and other Santa Rosa police officers that, when armed resistance is a possibility, a Search Warrant is best served during the early morning hours to minimize compromise of the entry. Rapid entry is essential and a delay of ten seconds, after the knock notice prior to entry, would in many situations be considered too long in that it would unnecessarily increase the risk factor for the officers. (App. 94-97, 99.)

On March 17, 1987, Sgt. Steen was assigned to lead the special response team which was to serve a Search Warrant for narcotics on the Misfit motorcycle gang's clubhouse in Santa Rosa. (App. 102.) The Search Warrant, the validity of which has been upheld by the district court, was properly endorsed for night time service due to the danger posed to the officers. (App. 44-45, 68-69, 75, 93.) The Warrant does not specify the amount of time that the police executing the Warrant were required to wait before forcible entry. (App. 72-75.)

Following an evidentiary hearing, the district court found that Sgt. Steen had knowledge of the following specific undisputed facts as he prepared to serve the narcotics Warrant:

- Respondent Joseph Deshetres was a member of the Misfit motorcycle gang, which had a reputation for drugs and violence;
- Deshetres had an arrest record dating back 15 years for various weapon and drug charges, but the most recent arrest, for armed robbery, was five years old;
- Nine years previous to the service of the Warrant Deshetres had been arrested by the Santa Rosa Police Department while reaching for a handgun;
- A single drug transaction involving methamphetamine was believed to have occurred at Deshetres' residence earlier in the week. (App. 50-51.)

The district court concluded that:

> "[T]he facts support a reasonable belief that Sgt. Steen's team would be met with armed resistance. Steen knew that Deshetres was housed within, and that he had a history of weapons offenses and a reputation for violence." (App. 52.)

At 6:00 a.m. on March 17, 1987, a SWAT team and a group of officers led by Sgt. Steen drove to the Misfit clubhouse to execute the narcotics Search Warrant. While approaching the clubhouse, the police observed a white pickup truck pull out from the Misfit's driveway. The driver was recognized as Ricky Flowers, an associate of the Misfit gang. Upon seeing the police, Flowers reversed his direction, and backed his truck into the Misfit driveway. The truck then pulled out into the roadway a second time, stopped and again backed into the driveway.

Flowers then left the truck in the driveway and disappeared towards the rear of the Misfit clubhouse. (App. 35, 60, 105-106.) When Sgt. Steen reached the empty truck in the driveway, he observed the driver's door still open, he heard the engine running, and he heard a radio still playing inside the truck. (App. 106.)

Upon seeing Flowers turn back to the clubhouse, and fearing premature discovery, Sgt. Steen concluded that rapid entry without knock notice was necessary to provide for officer safety and to prevent destruction of evidence. (App. 9, 38.)

While the police quickly surrounded the house, Officer Hemphill knocked on the front door and announced the police presence and purpose, twice announcing: "Santa Rosa Police! We have a Search Warrant!" Some 7-10 seconds after the second knock notice, Sgt. Steen instructed his officers at the front door to make a forcible entry, which took approximately 30 additional seconds. (App. 35-36, 106.)

The district court concluded that:

> "[T]he facts support a reasonable belief that [respondents] received some warning, albeit a brief one, that police were approaching the residence. Sergeant Steen's intent to catch [respondents] off guard was thus somewhat compromised. The record in this case indicates that although Steen intended to comply with the knock notice requirement, he altered his plans upon seeing that the police's approach was compromised by the driver of the white pickup. *The assumed warning by the driver of the white pickup thus provided [respondents] with approximately the*

> *same warning or opportunity to voluntarily surrender the premises as would have been provided by Sergeant Steen's compliance with the knock notice rule."*

(App. 52; emphasis added.)

Deshetres' response to the announced police presence was to confront the police in the house with a pistol at which time he was shot by Officer Hemphill.[1]

Respondents Deshetres and Thompson[2] claim that Sgt. Steen is personally liable for money damages for violating their civil rights under 42 U.S.C. § 1983. The sole basis for this claim is Sgt. Steen's alleged violation of the Fourth Amendment by ordering forcible entry into the Misfits' clubhouse 7-10 seconds after the second knock notice.

Petitioner moved for summary judgment in the district court claiming qualified immunity under *Anderson v. Creighton*, 483 U.S. 635 (1987), since the amount of time the police must wait prior to entry is not clearly established, especially where the police fear armed resistance and where a confederate prematurely discloses the police presence.

The district court denied petitioner's motion, ruling that Sgt. Steen's decision did not comply with the Fourth Amendment, that the law was clearly established, and

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[1] Deshetres testified in deposition that he could not remember whether or not he had a gun in his hand, and subsequently submitted a declaration saying that he did not point the gun at anyone. (App. 9-10.)

[2] Respondent Jerri Lynn Thompson appears individually and as guardian ad litem for Nicole L. Thompson, a minor.

that Sgt. Steen's decision was not objectively reasonable under the circumstances facing him at the time (App. 14-16). Petitioner then filed an interlocutory appeal to the Ninth Circuit. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Ninth Circuit affirmed the denial of qualified immunity in an unsigned, unpublished memorandum (App. 1-5).

REASONS FOR GRANTING THE PETITION

Sgt. Steen is entitled to summary judgment on qualified immunity grounds if a reasonable officer could have believed that the forcible entry 7-10 seconds after the knock and announcement was lawful in light of clearly established law and the information Sgt. Steen possessed. *Anderson v. Creighton*, 483 U.S. 635 (1987).

As the Court explained in *Hunter v. Bryant*, 116 L.Ed.2d 589 (1991), the key question that must be answered is:

> "Whether the [police] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."

116 L.Ed.2d at 595.

In denying Sgt. Steen qualified immunity, the Ninth Circuit reached a decision that is contrary to the settled law of this Court, the D.C. Circuit, and the Sixth Circuit. Further, the Ninth Circuit misapplied the *Hunter v. Bryant* standard for qualified immunity when it failed to cite the settled law allegedly violated by Sgt. Steen. In particular,

the Ninth Circuit cited no law that requires the police to wait longer than 7-10 seconds before entry when the police reasonably fear armed resistance. The Ninth Circuit cited no law that requires the police to disregard the premature disclosure of the police presence when determining the appropriate timing for entry. While the court of appeal concluded that Sgt. Steen did not wait long enough before entry, nowhere did the Ninth Circuit disclose how many more seconds Sgt. Steen was expected to wait at the front door prior to forcible entry. There is simply no settled law that required Sgt. Steen to act any differently than he did in this case.

The court of appeal also erred when it refused to consider the settled law cited by petitioner which in fact justifies the lawfulness of Sgt. Steen's decision. Had the Ninth Circuit analyzed the settled law, as required by *Hunter v. Bryant*, the court would have realized that the undisputed facts demonstrate petitioner's right to qualified immunity.

That the Ninth Circuit elected not to publish its opinion in this case does not diminish the deleterious effect of its ruling on the Santa Rosa Police Department and the law enforcement agencies throughout California and beyond, which are acutely aware of such developments and react accordingly. To be sure, the Ninth Circuit's refusal to give clear guidance – indeed any guidance – as to how much time the police must wait prior to forcible entry inevitably fosters a policy of hesitancy by the police, while the officers' F.B.I. training and the pre-existing settled law encourage a quick and decisive police response when confronted with a tense and life threatening assignment such as that presented in this case.

Thus, the issue presented is one of exceptional importance, not only for Sgt. Steen, but for all law enforcement officers, since a conflict exists among the circuits regarding how long law enforcement officers serving narcotics Search Warrants under perilous circumstances must wait prior to entry.

THE NINTH CIRCUIT DECISION IS CONTRARY TO THE SETTLED LAW OF THIS COURT; THE D.C. CIRCUIT; AND THE SIXTH CIRCUIT

An analysis of the settled law with regard to knock notice and the timing of entry must begin with *Ker v. California*, 374 U.S. 23 (1963). In *Ker*, the police, having reason to believe Ker had just purchased drugs for sale, entered Ker's apartment without a warrant, and without knocking or announcing their presence. After his arrest, Ker objected to the admission of the drugs found during the search claiming the search was in violation of the Fourth Amendment. In finding the police entry constitutional, this Court held that the knock notice requirement was excused entirely because:

> "In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was grounds for the belief that he might well be expecting the police."

374 U.S. at 30.

Here, it is undisputed that Sgt. Steen likewise believed that Deshetres and other Misfits would be in possession of narcotics which could be quickly and easily destroyed (App. 72-75), and the furtive conduct of

Deshetres' confederate was grounds for believing that Deshetres might well be expecting the police. (App. 52, 105-106.)

Moreover, in contrast to *Ker v. California*, the police in this case reasonably feared armed resistance (App. 52); the police had a valid narcotics Search Warrant properly endorsed for night time service (App. 44-45, 68-69); and the police announced their presence and purpose prior to entry, repeated that announcement and then waited 7-10 seconds. (App. 35-36, 106.) The 30 additional seconds needed to force entry afforded the occupants further opportunity to submit peaceably to police entry. (App. 105-106.) Thus, the circumstances presented here are far more compelling than those found constitutional by the United States Supreme Court in *Ker v. California*. Sgt. Steen's decision was therefore lawful; *a fortiori* he is entitled to qualified immunity.

In purporting to apply the Fourth Amendment to a circumstance where the police reasonably fear armed resistance, the Ninth Circuit in this case also ignored the importance of the police announcement of their purpose prior to entry as a means of preventing violence compared to the relative import of the actual timing of entry following the announcement. In *United States v. Bustamente-Gamez*, 488 F.2d 4 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974), the Ninth Circuit found no violation of the knock and announce rule where the police entry and announcement were simultaneous.

> "To the extent that the [knock notice] rule prevents violence, its utility is exhausted when the actual announcement is made. The concern here is that an unannounced intrusion will provoke

> citizens to exercise their general right to repel intruders by force (citation). However, few persons carry weapons about with them while they are at home. Thus, if announcement is made simultaneously with or shortly before entry, it is unlikely that a law abiding citizen would respond violently or would provoke violence on the part of the officers. Indeed, if an occupant is predisposed to resist an entry by police, a substantial delay between announcement and entry could only give him time to prepare."

488 F.2d at 11.

In denying Sgt. Steen qualified immunity, the Ninth Circuit also refused to consider the settled law of the D.C. Circuit. In *United States v. Bonner*, 874 F.2d 822 (D.C. Cir. 1989), the court approved forcible entry approximately 10 seconds following the first announcement. 874 F.2d at 825. After discussing the dangers facing an officer serving a Search Warrant on premises where narcotics violations are suspected, the *Bonner* court emphasized the physical danger to officers standing in front of a closed door after having given notice of their presence:

> "Once police officers seeking to enter a drug traffickers' enclave have announced their identity and authority, they stand behind the door blind and vulnerable. In such a danger-fraught situation, the officers may quite reasonably infer refusal more readily than under other circumstances."

874 F.2d at 824.

In *Bonner*, unlike this case, the police had no specific expectation of armed resistance from the occupants, nor was there any premature warning of the police presence

prior to their announcement at the front door. Nonetheless, the D.C. Circuit found the rapid forcible entry permissible given the inherent likelihood in narcotics cases of destruction of evidence, and the danger posed to the entering police officers:

> "At such moment we do not think that § 3109 [the federal knock and announce statute] requires police officers to execute a carefully schooled quadrille and await precise proper responses before moving."

874 F.2d at 827, *citing United States v. Harris*, 435 F.2d 74 (D.C. Cir. 1970).

Finally, the Ninth Circuit's decision is contrary to the settled law of the Sixth Circuit. In *Hall v. Shipley*, 932 F.2d 1147 (6th Cir. 1991) the police had a Search Warrant for narcotics for Hall's residence. The police forcibly entered Hall's home unannounced based upon an informant's statement that evidence might be destroyed absent rapid entry. Hall sued claiming that the unannounced forced entry violated his Fourth Amendment rights. The police moved for summary judgment on the grounds of qualified immunity. In analyzing the lawfulness of the unannounced forced entry, the Sixth Circuit observed that:

> "The Supreme Court has not ruled whether the Fourth Amendment requires police officers executing a search warrant to knock, announce their purpose, and be refused admittance before they can break down the door of a building to enter it."

932 F.2d at 1151. The Sixth Circuit then discussed the "two major schools of thought" with regard to whether unannounced forcible entry is "always reasonable" in

narcotics cases on the grounds that narcotics violators are normally on the alert to destroy any contraband at the first notice of an officer's presence. In light of the disparate case law, the Sixth Circuit held that the police were entitled to qualified immunity:

> "An objectively reasonable officer confronted with these circumstances could have believed that an unannounced, forced entry was necessary and consistent with Hall's fourth amendment rights."

932 F.2d at 1153.

In *Hall v. Shipley*, the officers were entitled to qualified immunity despite the fact that the forced entry was unannounced, and the police did not fear armed resistance, whereas here Sgt. Steen did reasonably fear armed resistance and the police in fact knocked and announced their purpose and then waited 7-10 seconds. In summary, there is ample authority to justify the lawfulness of Sgt. Steen's decision. The Ninth Circuit's error here stems from its refusal to consider this authority and its failure to apply the teaching of *Hunter v. Bryant*, which makes clear that qualified immunity is intended to give:

> "ample room for mistaken judgments by protecting 'all but the plainly incompetent or those who knowingly violate the law.' This accommodation for reasonable error . . . exists because 'officials should not err always on the side of caution' because they fear being sued."

116 L.Ed.2d at 595.

The Ninth Circuit thus places Sgt. Steen, and the many other law enforcement officers serving narcotics

Search Warrants in similar dangerous circumstances, in the stark dilemma that the qualified immunity doctrine is intended to avoid. A police officer must not be forced to choose between being charged with dereliction of duty for failing to act or facing civil liability if he does, especially during a perilous assignment that demands split second decisive action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 31, 1992

Respectfully submitted,

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APPENDIX

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NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, individually and as Guardian ad Litem for Nicole L. Thompson, a minor, and JOSEPH DESHETRES, Plaintiffs-Appellees, v. LARRY WAYNE MAHRE, Defendant, and MICHAEL STEEN, Defendant-Appellant.	No. 91-15055 D.C. No. CV-88-874-DLJ MEMORANDUM* (Filed APR -2 1992)

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding
Argued and Submitted February 13, 1992
San Francisco, California

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

This appeal arises out of a rather complex 42 U.S.C. § 1983 action involving forcible entry of a residence used as a motorcycle gang clubhouse. At issue here is solely

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

the question whether the district court erred in denying defendant Sergeant Steen's motion for summary judgment based upon qualified immunity. We have jurisdiction of an appeal from an interlocutory order for such review. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Steen is entitled to qualified immunity if his decision to dispense with knock-notice was "objectively legally reasonable" in light of clearly established law. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Before the district court considered Steen's motion for summary judgment, it held an evidentiary hearing to determine, inter alia, whether the forcible entry, instigated by Sergeant Steen, violated the fourth amendment prohibition against unreasonable searches and seizures. *Ker v. State of California*, 374 U.S. 23 (1963) (fourth amendment, as applied to the states through the fourteenth amendment, protects against unannounced police entry absent exigent circumstances). In its order of February 9, 1990, the district court found, and it is not here disputed, that the officers after announcing their arrival waited only seven to ten seconds before beginning their forcible entry with a battering ram. The district court concluded that this was not in compliance with the knock-notice requirement because the police did not wait a sufficient amount of time after announcing their presence before beginning their forcible entry.

Steen maintains in this appeal that he is entitled to qualified immunity because he objectively reasonably believed that immediate entry was justified by exigent circumstances. The claimed exigency was a warning, presumably received by occupants of the house, given by a

pick-up driver who witnessed the arrival of the police and retreated back toward the residence.

Exigent circumstances are those "that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons." *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989) (quotation omitted). Exigent circumstances also exist where an officer has probable cause to believe that evidence is being destroyed, *see United States v. Moreno*, 701 F.2d 815, 818 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 913 (1984), or that occupants are armed and intend to resist violently, *see United States v. Scott*, 520 F.2d 697, 700-01 (9th Cir. 1975), *cert. denied*, 423 U.S. 1056. The district court carefully examined whether the facts of this case, as perceived by Sargent Steen, presented any one of these recognized exigencies.

The district court found that no exigent circumstance excused Sergeant Steen's failure to comply with the knock-notice requirement. There was no objective basis for the police to believe that many people were inside the house preparing to give armed resistance, nor was there any indication that evidence was being destroyed or that occupants were attempting to escape. The police were positioned to act, however, had any one of these exigencies developed.

In the absence of any clearly established basis for exigency, the district court focused on Steen's belief that there had been a warning to the occupants of police presence. The court considered whether the warning, without independent evidence of armed resistance or evidence destruction, created exigent circumstances. The

court found that the warning was so close in time to the officer's announcement at the front door, that the warning coupled with the few seconds the police waited after their announcement, would have given the plaintiffs no more time to respond to the officer's arrival, than the plaintiffs would have had if the officers had complied with the knock-notice requirement. Therefore, it was not objectively reasonable for Sergeant Steen to believe that the presumed warning from the pick-up driver, in the absence of any other perceived risk of violence or destruction of evidence, created any sort of exigency. As the district court explained:

> [T]he specific facts that support Steen's reasonable belief that plaintiffs' residence would be occupied by Deshetres when defendants executed the warrant, that Deshetres might react with armed resistance, and that Deshetres was given some warning of the police's approach, does not excuse his failure to comply with the knock-notice rule. These facts do not raise the presumption that officers' safety was endangered to the point necessary for this court to find that exigent circumstances existed. Likewise, defendants have not demonstrated exigent circumstances based on the possibility that plaintiffs would destroy evidence.

Based upon the district court's factual findings, which are not clearly erroneous, that conclusion is sound.

The district court did engage in the kind of fact-specific analysis required by *Anderson v. Creighton*, 483 U.S. 635, 641 in assessing whether Sargent Steen's conduct was objectively reasonable. Appellant has not set forth any legal or factual basis to undermine the district

court's ruling that Steen was not entitled to summary judgment on the issue of qualified immunity. Accordingly, we affirm. The result of our affirmance on this interlocutory appeal of the district court's denial of a summary judgment motion based upon qualified immunity issue is to return the qualified immunity issue to the district court for determination on its merits. We express no view on those merits here, nor do we resolve whether the course of future proceedings is limited by an understandings reached by the parties, by any waiver arising form the parties' conduct in prior proceedings, or by any prior ruling of the district court which may obviate the need for further evidentiary proceedings.

AFFIRMED.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERI LYNN THOMPSON, individually and as Guardian ad Litem for Nicole L. Thompson, a minor, and JOSEPH DESHETRES, Plaintiffs-Appellees, v. LARRY WAYNE MAHRE, Defendant, and MICHAEL STEEN, Defendant-Appellant.	No. 91-15055 D.C. No. CV-88-874-DLJ (Northern California) ORDER (Filed JUN -3 1992)

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERI L. THOMPSON, individually, and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor,

Plaintiffs,

v.

CITY OF SANTA ROSA, et al.,

Defendants

C-88-0874-DLJ

JOSEPH DESHETRES,

Plaintiff,

v.

CITY OF SANTA ROSA, et al.,

Defendants.

C-88-0875-DLJ

ORDER

(Filed Dec. 27, 1990)

This Court heard defendants' motion for summary judgment on September 5, 1990. Rene Chouteau appeared for defendants. John H. Scott and Andrew Unetic appeared for plaintiff Joseph Deshetres. Leroy Lounibos, Jr. appeared for plaintiff Jeri Lynn Thompson. For all of the following reasons, the Court grants in part and denies in part defendants' motion.

I. BACKGROUND FACTS

This action for civil rights and tort law violations arises from the entry of plaintiffs' residence, pursuant to a search warrant, by officers of the Santa Rosa Police Department in March 1987.

At approximately 6:15 a.m. on March 17, 1987, a SWAT team led by Sergeant Michael Steen of the Santa Rosa Police Department entered plaintiffs' residence at 3365 Moorland Avenue in Santa Rosa. The officers had in their possession a search warrant signed by a magistrate.[1] In the previous week, the Santa Rosa police had observed a narcotics transaction which they believed to be linked to plaintiffs' residence, and they further believed that the residence served as a clubhouse for the Misfits Motorcycle Gang. As they approached the residence, the police were spotted by a man leaving the house, whom they recognized as Ricky Flowers, a member of the Misfits. Upon seeing the police, Flowers reversed his direction and moved towards the back of the residence, where he was later apprehended by the police.

Other officers surrounded the house, in accordance with an operational plan previously prepared by Sergeant Steen. Defendants Ed Hemphill and Keith Covington approached the front door with the intention of knocking and announcing the presence of the Santa Rosa police, and then, if necessary, forcibly entering the residence. Defendants David Albritton and Gary Reynolds went around to the side of the house and stood by the bathroom window and back bedroom window, respectively. Albritton's assignment was to apprehend anyone attempting to dispose of narcotics in the toilet or attempting to escape through the bathroom window during the

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[1] The Court provided a lengthy description of how officers from the Santa Rosa Police Department obtained the search warrant in its orders of February 9, 1990, and July 7, 1989. These orders are incorporated by reference here.

initial entry of the house. Reynolds' assignment was to break the bedroom window as a diversion for the officers entering the front of the house.

Upon seeing Flowers turn back to the residence, and fearing premature discovery of the police's presence, Sergeant Steen decided to abandon his intention to comply with the knock-notice requirements. Under orders from their Sergeant, Hemphill and Covington began dismantling the front door with a battering ram some 7 to 10 seconds after announcing their presence. No response had yet been heard from within.

The parties dispute what transpired after the police entered the house. As the non-moving parties on summary judgment, plaintiffs bear the burden of presenting admissible evidence that creates a triable issue of fact. For purposes of this motion, the Court assumes plaintiffs' version of the events occurring after the police entered their residence to be true.

At the time of entry, plaintiffs Joseph Deshetres, Jeri Lynn Thompson, and Ms. Thompson's infant daughter Nicole, were asleep in the back bedroom. Thompson was awakened by the noises coming from the front of the house and attempted to wake Deshetres. After a period of time Deshetres stumbled out of bed and moved towards the bedroom door. Soon after passing through the door frame, Deshetres was spotted by Officers Covington, Hemphill, and David Hayes, each of whom by this time had taken cover in Deshetres' living room. Officer Hemphill shot and wounded Deshetres. Officer Hayes and Officer Hemphill have testified that they saw a gun in Deshetres' right hand. Deshetres testified in deposition

that he could not remember whether or not he had a gun in his hand, and subsequently submitted a declaration that he did not point the gun at anyone. After being shot, Deshetres fell back into the bathroom where he could be seen by Officer Albritton through the window.

At and about the same time of the Deshetres shooting, Santa Rosa police officers in the house fired a number of shots. One shot struck and killed the family's labrador retriever, another shot, hit, and wounded one of their fellow officers, and other shots damaged the house and its contents.

During this period, Thompson could see Deshetres on the bathroom floor, and could see that he was bleeding badly. She also could hear the sounds of gunfire within the house. Under orders from Officer Reynolds, who had knocked out the bedroom window, Thompson remained seated on the bed wearing only a T-shirt and underpants. According to Thompson, Reynolds used profanity and threatened to kill her if she approached Deshetres or moved to put on more clothes. Reynolds then forced Thompson at gunpoint to pass her infant daughter to him through the broken bedroom window, while the shooting was still occurring. Thompson herself was then made to crawl through the bedroom window, whereupon she was quickly rushed into a police car.

This Court conducted a lengthy evidentiary hearing in this case in December 1989. In its order of February 9, 1990, the Court ruled that the entry into plaintiffs' residence on March 17, 1987 was an unreasonable search and seizure and thus violated the plaintiffs' constitutional rights. The Court specifically held that the officers failed

to comply with the knock-notice requirement in effecting service of the warrant at plaintiffs' residence, and that this failure to comply was not excused by exigent circumstances.

Plaintiffs Deshetres and Thompson filed separate, first amended complaints on March 12 and 13, 1990. Both complaints allege violations of the plaintiffs' civil rights under 42 U.S.C. § 1983 by Sergeant Steen, Officers Hemphill, Covington, Reynolds, and Albritton, Chief of Police Rosano, and the City of Santa Rosa (hereinafter "the City"). Deshetres' complaint also includes causes of action for assault and battery, and negligence against the City. In addition to these two causes of action, Thompson's complaint also seeks relief against the City for intentional infliction of emotional distress. The City's liability for these torts is based upon state law, which holds the City liable for the tortious acts of its agents.

Defendants previously moved for dismissal of the civil rights claims against each defendant, or, in the alternative, for summary judgment. At a hearing conducted on May 30, 1990, the Court found that defendants' motion was more properly treated as one for summary judgment, and consequently ordered additional briefing. The Court further instructed defendants to bring a supplementary motion for summary judgment as to plaintiffs' state law claims, so that all issues in these two cases could be consolidated into a single summary judgment motion.

II. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment

when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Recognizing that summary judgment motions can contribute significantly to the resolution of litigation when there is no factual issues, the Supreme Court and the Ninth Circuit have established the following standards for consideration of such motions: "If the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific facts* showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed.R.Civ.P. 56(e) (emphasis added) and citing *Kaiser Cement Corp. v. Fischbach & Moore. Inc.*, 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied*, 107 S. Ct. 435 (1986) and *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986)). With respect to these specific facts offered by the non-moving party, the court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)).

Rule 56(c) nevertheless requires this Court to enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 106 S. Ct. at 2552. The mere existence of a scintilla of evidence in support of the nonmoving party's position is insufficient: "[T]here must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986). This Court thus applies to either a defendant's or plaintiff's motion for summary judgment the same standard as for a motion for directed verdict: "[W]hether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

III. DISCUSSION

Defendants now move for summary judgment in favor of all defendants on all of plaintiffs' claims. Regarding plaintiffs' civil rights claims, defendants move for summary judgment on grounds of qualified immunity and the absence of evidence establishing conduct depriving plaintiffs of their constitutional rights. As to plaintiffs' tort law claims, defendants move for summary judgment on grounds of lack of evidence of tortious conduct.

A. Plaintiffs' claims against Sergeant Steen under § 1983.

Defendants seek summary judgment in favor of Sergeant Steen on the issue of his liability under § 1983 for the entry into plaintiffs' residence by the Santa Rosa

Police Department in March 1987. Because this Court has already determined that Sergeant Steen's conduct violated plaintiffs' constitutional rights, *see* Order of February 9, 1990, the Court's inquiry focuses on whether or not Sergeant Steen is protected by qualified immunity.

The legal standards for qualified immunity are well settled. Sergeant Steen is entitled to qualified immunity if his search of plaintiffs' residence did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). The test is one of objective reasonableness, *Malley v. Briggs*, 106 S. Ct. 1092, 1097-98 (1986), which enables this Court to rule on the issue of qualified immunity as a matter of law, *Anderson v. Creighton*, 107 S. Ct. 3034, 3040 (1987).

An official may be entitled to immunity from suit even where, as with Sergeant Steen, he has violated a plaintiff's constitutional or statutory rights. This Court must separately determine whether or not the rights violated by Sergeant Steen were clearly established, and whether or not a reasonable person in Sergeant Steen's position could have failed to appreciate that his conduct would violate them. These inquiries relating to qualified immunity are distinct from the issue of the constitutionality of Sergeant Steen's conduct, even when the conduct in question involves rights under the Fourth Amendment. *See Anderson v. Creighton*, 107 S. Ct. at 3040-41.

Plaintiffs argue that the reasoning relied upon by this Court in previously finding a statutory and constitutional violation by Sergeant Steen precludes the application of

qualified immunity of civil damages. *See Kennedy v. Los Angeles Police Dep't*, 887 F.2d 920, 924 (9th Cir. 1989). Plaintiffs' argument is persuasive, as the Court indeed focused on the specific factual determinations made by Sergeant Steen, and concluded that he did not have a reasonable belief that compliance with the knock-notice requirement would endanger the safety of the officers. *See* Order of Feb. 9, 1990, at 18-27. Nevertheless, the Supreme Court has ruled that qualified immunity is not foreclosed to officials who are alleged to have violated the Fourth Amendment. *Anderson*, 107 S. Ct. at 3040-41. The Court therefore revisits the issue of whether Sergeant Steen's conduct violated clearly established statutory and constitutional rights of which a reasonable person would have known.

This Court reviewed at length the rules governing compliance with knock-notice, under both the Fourth Amendment and California Penal Code § 1531, in its Order of February 9, 1990. The Court finds that these constitutional and statutory standards were clearly established in March 1987 and provided guidance to police officers who regularly execute search warrants. In its Order of February 9, the Court also engaged in a fact-specific analysis regarding the reasonableness of Sergeant Steen's conduct. The Court concluded then, as it does now, that Sergeant Steen's decision to dispense with the knock-notice requirement was not objectively reasonable under the circumstances facing him at the time. The record in this case indicates that Sergeant Steen meticulously prepared for the execution of the search warrant at plaintiffs' residence, but that these plans were abruptly put aside when, upon approaching the residence, the

police officers concluded that their presence had been prematurely disclosed to plaintiffs.

For these reasons, as well as those stated in its February 9, 1990 Order, the Court finds that Sergeant Steen abandoned his intention to comply with the knock-notice requirements based upon an erroneous and unreasonable belief that exigent circumstances existed. Accordingly, Sergeant Steen is not entitled to the protection of qualified immunity in this case.

B. Plaintiffs' claims against the other officers under § 1983.

Four Santa Rosa police officers who assisted Sergeant Steen in executing the search warrant at plaintiffs' residence also move for summary judgment as to plaintiffs' civil rights claims.

The following facts, which in large part are undisputed, account for each officer's role in entering plaintiffs' residence in March 1987. Officer Ed Hemphill gave the initial knock-notice, and, after repeating it, entered the plaintiffs' residence pursuant to Sergeant Steen's orders. Once inside, Hemphill shot and wounded Deshetres as he was coming out of a back bedroom. Officer Keith Covington assisted Hemphill in breaking down plaintiffs' front door with a battering ram, and then proceeded into plaintiffs' living room. Officers Albritton and Reynolds were stationed at the back side of the house at the time that Hemphill and Covington crashed through the front door. Albritton and Reynolds broke the bathroom and bedroom windows, respectively, shortly after Hemphill and Covington entered the residence. Albritton

required Deshetres to climb out the bath-room window after being shot. Reynolds forced Thompson at gunpoint to remain stationary in the bedroom after Deshetres had been shot, refused to allow her to dress, and then demanded that she pass her nine-month-old child out the bedroom window. Reynolds eventually ordered Thompson to also climb out the broken window, and then placed her into custody and handcuffed her.

Plaintiffs contend that these four defendants are liable under § 1983 not for their specific conduct after the break-in, but rather for their alleged personal participation in the knock-notice violation, which plaintiffs contend caused the injuries to Deshetres and Thompson. Thus, plaintiffs do not contend that Hemphill is liable under § 1983 for shooting Deshetres, nor do they contend that Officer Reynolds is liable under § 1983 for his conduct in taking Thompson and her daughter into custody. Plaintiffs stated at oral argument that their § 1983 claims against Officers Hemphill, Covington, Albritton, and Reynolds do not rely upon allegations of excessive force or false imprisonment. Instead, the conduct complained of is limited to the breaking down of plaintiffs' front door by Officers Hemphill and Covington, and the breaking of windows by Officers Albritton and Reynolds. Plaintiffs believe that these officers are, therefore, collectively and personally responsible for the unlawful search flowing from the knock-notice violation, and personally liable for all personal injuries and property damage which occurred thereafter, on the theory that the knock-notice violation is the proximate cause of such damage.

The Court finds that plaintiffs' theory of liability under § 1983 for these four defendants is without merit.

Plaintiffs cite a single legal authority, *Duke v. Superior Court*, 1 Ca1.3d 314 (1969), for the proposition that these officers can be held liable under § 1983 for merely participating in an unlawful search. *Duke*, however, did not involve § 1983 or the imposition of personal liability. Rather, the California Supreme Court decided *Duke* in the context of the Fourth Amendment's exclusionary rule.

The legal standards for attaching personal liability for civil damages under § 1983 are altogether different. Individual liability must be based on an affirmative act, participation in the affirmative act of another, or failure to act where there is a duty to do so. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As stated recently by the Supreme Court, where the asserted violation is a deprivation of Fourth Amendment rights, the case is to be analyzed, in the § 1983 context, in terms of whether or not the individual conduct was objectively reasonable under the circumstances. *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989).

The record in this case does not include sufficient evidence to support a finding that Officers Hemphill, Covington, Albritton, and Reynolds were in possession of the same information as Sergeant Steen at the time they entered plaintiffs' residence. Moreover, the record does not contain evidence that any of these officers aided and abetted by counseling, advising, or encouraging Sergeant Steen to order entry into the house without complying with the knock-notice requirements. The Court cannot presume equivalent knowledge by these officers, and therefore the Court's fact-specific analysis regarding Sergeant Steen's actions, *see* Order of Feb. 9, 1990, is not relevant in evaluating whether or not their conduct was

objectively reasonable. Instead, the Court focuses on the undisputed fact that the officers were following the orders of Sergeant Steen in entering plaintiffs' residence. The decision to follow the orders of one s superiors is certainly objectively reasonable within the meaning of *Graham v. Connor.*

Additionally, the Court notes that individual liability under § 1983 requires proof that the individual conduct caused the injury or damage. In this case there is a clear lack of evidence to support a factual finding that Sergeant Steen's decision to enter plaintiffs' residence proximately caused the individual conduct of the officers after entry.

Because the Court finds that plaintiffs have failed to demonstrate that the conduct of these four officers violated § 1983, the Court does not reach the issue of whether or not plaintiffs' § 1983 claims against the officers are barred by the doctrine of qualified immunity.

For the foregoing reasons, the Court grants summary judgment in favor of defendants Hemphill, Covington, Albritton and Reynolds as to plaintiffs' civil rights claims under § 1983.

C. Municipal liability under § 1983.

Defendants move for summary judgment as to plaintiffs' claims against the City of Santa Rosa under § 1983. Plaintiffs contend that the City is liable for its alleged policy or custom of failing to comply with knock-notice requirements in executing police search warrants.

In 1978 the Supreme Court overruled its previous decisions on the subject and held that municipalities and

other local government units are "persons" to whom the Civil Rights Act of 1971 applies and that they may be sued for violations of 42 U.S.C. § 1983. *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S. Ct. 2018 (1978). At the same time the Court held that the municipality cannot be liable solely because it employs a tortfeasor, *i.e.*, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory. *Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

To establish the liability of a municipality under § 1983 for unconstitutional acts by its employees, a plaintiff must show that the violation of his or her constitutional rights was caused by a municipal custom or policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79, 106 S. Ct. 1292, 1297-98 (1986). The plaintiff, however, need not show that the municipality has an explicitly stated rule or regulation; the inference that a policy existed may be drawn from circumstantial proof. *Monell*, 436 U.S. at 690-91, 98 S. Ct. at 2036 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S. Ct. 1598, 1613 (1970)).

In this case plaintiffs contend that the City is liable for its policy regarding knock-notice based on two separate theories. First, plaintiffs argue that Sergeant Steen created the City's knock-notice policy, and was delegated that authority by higher officials within the police department. Plaintiffs' argument relies heavily upon the Supreme Court decision in *Pembaur*, which held that municipal liability may be imposed for a single decision by a municipal policymaker. *Pembaur*, 475 U.S. at 480-81, 106 S.Ct. at 1298-99.

The Court finds the facts of *Pembaur* distinguishable from the present case. In *Pembaur*, a county prosecutor instructed police officers at the scene by telephone that a forcible entry into the offices of a medical clinic would be lawful. On these facts, the Supreme Court held that the prosecutor's instructions amounted to a policy decision which subjected the municipality to liability under § 1983. In the present case, Sergeant Steen made the decision at the scene within the space of seconds, without consulting any other City authorities, to abandon the knock-notice requirement after his initial plan in executing the search warrant had gone awry. Such conduct hardly amounts to a municipal policy decision. As the Supreme Court emphasized in *Pembaur*, "not every decision by municipal officers automatically subjects the municipality to section 1983 liability." 475 U.S. at 481, 106 S. Ct. at 1299. The Court finds that Sergeant Steen's decision in this case does not implicate municipal liability under the doctrine of *Pembaur*.

Second, plaintiffs argue that Sergeant Steen's violation of plaintiffs' constitutional rights was sufficiently ratified and adopted by policymakers to raise an inference of a pre-existing custom or policy. *See Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985), *rehearing denied*, 779 F.2d 1129 (5th Cir. 1986) (en banc), *cert. denied*, 107 S. Ct. 1369 (1987). Plaintiffs contend that their evidence of ratification by the City sufficiently places a material fact in issue to preclude the granting of summary judgment to the City on this issue. The Court disagrees. *Grandstaff* concerned the issue of the municipality's conscious indifference to widespread reckless disregard for human life and safety among the

municipality's police force. The Fifth Circuit reasoned in that case that

> [w]here police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force requirement is satisfied.

Id. at 170. This Court need not reach the issue of whether or not the Fifth Circuit's reasoning survives the decision of *City of Canton. Ohio, v. Harris,* 109 S. Ct. 1197 (1989). Plaintiffs have presented no evidence that Sergeant Steen knew at the time of his decision that his disregard for the knock-notice requirements would be subsequently ratified or adopted by the City. Indeed, there is no testimony by Steen on this subject, nor is there any evidence of previous incidents where Steen or other Santa Rosa police officers failed to comply with knock-notice requirements. The Court therefore finds the reasoning of the *Grandstaff* case inapposite.

For the reasons stated, the Court finds that plaintiffs have presented insufficient evidence to support their contention that Sergeant Steen acted as a "municipal policymaker" within the meaning of *Pembaur* in ordering entry into plaintiffs' residence in March 1987. To elevate Sergeant Steen's hurried decision to enter the residence, on the facts of this case, to a decision by a municipal policymaker would be a broad and unreasonable extension of the *Pembaur* doctrine. The Court declines to embark on such a misguided course. Moreover, plaintiffs have presented insufficient evidence to place their case within the

ratification principle articulated in the *Grandstaff* decision. Rather, the Court finds that Sergeant Steen's actions in this case were not officially sanctioned or ordered by the municipality, and there-fore were not, properly speaking, acts of the municipality. *See Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38.

Accordingly, the Court grants summary judgment in favor of the City of Santa Rosa as to plaintiffs' claims under § 1983.

D. Plaintiffs' claim against Chief Rosano under § 1983.

Defendants also move for summary judgment as to plaintiffs' claims against Police Chief Rosano, based on the undisputed facts that he was not at the scene and did not participate in the search of plaintiffs' residence. Plaintiffs seek to impose liability under § 1983 against Chief Rosano both in his personal and official capacities.

To the extent that plaintiffs seek relief against Rosano in his official capacity as Chief of Police, the Court's analysis of legal and factual issues relevant to the motion for summary judgment is the same as that for the claim against the City itself. *Monell* held that suits against local government officials in their official capacities may be brought under § 1983, since they are simply another way of pleading an action against the entity of which the officer is an agent. *Monell*, 436 U.S. at 690 n.55, 98 S. Ct. at 2035 n.55. A suit against an official in his or her official capacity is not a suit against the official, but rather is a suit against the official's office. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2311 (1989).

Because this Court has already found that the City of Santa Rosa is not liable under § 1983 for Sergeant Steen's decision to forcibly enter plaintiffs' residence, and for these same reasons, the Court holds that plaintiffs' claim against Chief Rosano in his official capacity must also fail.

To the extent, however, that plaintiffs' action states a claim against Chief Rosano individually, the Court's analysis must be different. Although *Monell* teaches that a city is a "person" under § 1983, it must be remembered that that "person" is created by law and not by nature. When *City of Canton* states that a municipal "person" must act with "deliberate indifference" in order to be liable, the Supreme Court is defining a culpable state of mind for a mind that exists only as a legal fiction. Chief Rosano is, of course, a natural person with a real mind, and the suit against him individually must recognize that fact. If he is to be personally liable it must be because his personal actions, carried out with a culpable frame of mind he actually holds, cause a constitutional injury. The essential point is that the theories of liability used to assess municipal responsibility can support individual liability only where they are consistent with the elements of proof necessary to impose individual liability. As previously stated, these elements of proof include an affirmative act, participation in the affirmative act of another, or failure to act where there is a duty to do so. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Any such act or failure to act must be carried out with a personal frame of mind that is, at a minimum, deliberately indifferent to the constitutional rights of the plaintiff. *Sample v. Diecks*, 885 F.2d

1099, 1117-18 (3d Cir. 1989) (citing *City of Canton*, 109 S. Ct. at 1205)).

Plaintiffs present only threadbare evidence of Chief Rosano's personal participation in the violation of their knock-notice rights. Chief Rosano was informed of the operations plan prepared by Sergeant Steen before the service of the search warrant. Rosano declined to take any action with respect to the plan. In formulating the plan, however, Steen's intention was to comply with the knock-notice requirement in serving the search warrant. Only after arriving at the scene and concluding that the element of surprise had been taken away did Steen abandon his intention to comply with knock-notice. Plaintiffs have also demonstrated that Chief Rosano reviewed and approved the investigatory report of the police's entry into plaintiffs' residence. That report concluded that the officers involved in executing the search warrant had complied with Department policy.

Based on this showing of evidence of Chief Rosano's personal participation, the Court concludes that there is no disputed issue of material fact which bars summary judgment on this issue. Chief Rosano took no affirmative actions himself whatsoever regarding compliance with knock-notice before the incident in question, and he participated in Sergeant Steen's unlawful conduct only tangentially and only after the fact. Moreover, plaintiffs have failed to identify any failure to act by Chief Rosano where there existed duty to do so that deprived them of their knock-notice rights. On this record, the Court also finds no evidence that Chief Rosano's personal frame of mind was deliberately indifferent to the constitutional rights of the plaintiff.

For these reasons, the Court holds that Police Chief Rosano is entitled to summary judgment as to plaintiffs' civil rights claims.

E. Plaintiffs' tort law claims.

Defendants move for summary judgment regarding plaintiffs' claims under state law for assault and battery, negligence, and emotional distress.

Although defendants' motion seeks summary judgment in favor of the same defendants sued under § 1983, plaintiffs' counsel stated at oral argument that their amended complaints name only the City of Santa Rosa as a defendant for the causes of action sounding in tort. Specifically, plaintiff Deshetres brings causes of action against the City of Santa Rosa for (1) the assault and battery committed by its agents and employees, and (2) the negligence of its agents and employees. Plaintiff Thompson brings causes of action against the City of Santa Rosa for (1) the assault and battery committed by its agents and employees, (2) the negligence of its agents and employees, and (3) the intentional infliction of emotional distress by its agents and employees.

Regarding plaintiff Deshetres' tort law claims, the Court finds that there exist disputed issues of material fact within the record of this case regarding whether or not Officer Hemphill shot Deshetres in self-defense, and whether or not the conduct of the City's agents and employees after entering plaintiffs' residence rises to the level of negligence. The Court further finds that disputed issues of material fact exist regarding plaintiff

Thompson's claims for assault and battery, and negligence. Finally, the Court is satisfied at this juncture that plaintiff Thompson has stated a prima facie case of intentional infliction of emotional distress, based on the conduct of Officer Reynolds in using profanity, threatening to shoot her, forcing her to give up her nine-month-old child, refusing to allow her to dress or to take cover from the gunfire, and forcing her to exit the residence through the broken bedroom window.

1. Civil Procedure Code § 262.1.

Notwithstanding the existence of disputed issues of material fact regarding plaintiffs' tort law claims, defendants move for summary judgment on grounds of immunity. Defendants first contend that plaintiffs' state law claims are barred by the immunity set forth in California Code of Civil Procedure § 262.1. Defendants argue that § 262.1 imposes an express duty among peace officers to execute a valid search warrant, and that these officers are immune from suit when they act reasonably in furtherance of the search warrant. *See Vallindras v. Mass. Etc. Ins. Co.*, 42 Ca1.2d 149, 156 (1954). However, the Court is aware of no authority that suggests that § 262.1 protects conduct amounting to assault and battery, negligence, and intentional infliction of emotional distress. Whether the officers who entered plaintiffs' residence acted reasonably or unreasonably is a disputed fact in this case, and therefore the Court cannot rule on this issue as a matter of law. Accordingly, defendants are not entitled to summary judgment as to plaintiffs' state law claims on

grounds of immunity under California Code of Civil Procedure § 262.1.

2. Government Code § 820.2

Defendants also move for summary judgment on grounds of immunity under California Government Code § 820.2, which shields public employees from liability for any injury caused by their discretionary acts. If the individual officers who participated in the search of plaintiffs' residence are immune under § 820.2, then the City of Santa Rosa is also immune from liability. Cal. Gov't Code § 815.2(b); *see also Sullivan v. City of Sacramento*, 190 Cal. App. 3d 1070, 1080 (1987).

The issue before the Court thus narrows to whether or not the actions of Officers Hemphill, Covington, Albritton, and Reynolds were "discretionary" within the meaning of § 820.2. The underlying policy of the immunity provided by § 820.2 is to prevent second guessing of conduct by public officials where they are required to choose between alternative available courses of conduct in carrying out their duties. The conduct at issue here, however, is not an available alternative. No one may choose to commit or not commit an assault and battery. The alleged tortious conduct by the police officers either happened or it did not happen. If it happened, it is not immune conduct within the meaning of California Government Code Section 820.2.

Accordingly, the Court holds that the City is not shielded by immunity under California Government Code §§ 815.2(b) and 820.2 as to plaintiffs' causes of action for assault and battery, and as to Thompson's

cause of action for intentional infliction of emotional distress. The Court further finds that the City is not shielded by immunity for plaintiffs' negligence causes of action.

IV. CONCLUSION

For all of the foregoing reasons, the Court ORDERS the following:

1. Defendants' motion for summary judgment in favor of Sergeant Steen as to plaintiffs' claims under § 1983 is DENIED.

2. Defendants' motion for summary judgment in favor of Officers Hemphill, Covington, Albritton, and Reynolds as to plaintiffs' claims under § 1983 is GRANTED.

3. Defendants' motion for summary judgment in favor of the City of Santa Rosa as to plaintiffs' claims under § 1983 is GRANTED.

4. Defendants' motion for summary judgment in favor of Police Chief Rosano as to plaintiffs' claims under § 1983 is GRANTED.

5. Defendants' motion for summary judgment in favor of the City of Santa Rosa as to plaintiffs' tort law claims is DENIED.

A status conference in this matter is scheduled for Wednesday, February 6, 1991, at 9:00 a.m.

IT IS SO ORDERED.

DATED: December 27, 1990.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERI L. THOMPSON, individually and as Guardian ad Litem for NICOLE L. THOMPSON, a minor,

Plaintiffs,

v.

LARRY W. MAHRE, et al.,

Defendants.

C-88-0874-DLJ
C-88-0875-DLJ

JOSEPH DESHETRES,

Plaintiff,

v.

LARRY W. MAHRE, et al.,

Defendants.

ORDER
(Filed Feb. 9, 1990)

This Court conducted an evidentiary hearing concluding on December 15, 1989, in the above captioned civil rights actions. The hearing presented two issues for decision: (1) whether the police officers of the City of Santa Rosa had probable cause to support the search warrant used to enter plaintiffs' residence, and (2) whether defendants complied with the knock-notice entry requirement in serving the warrant. The parties introduced oral and documentary evidence to support their respective positions, and then argued and submitted these issues for decision. Andrew Unetic and John

Houston Scott appeared for plaintiff Joseph Deshetres. Leroy Lounibos, Jr. appeared for plaintiff Jeri Lynn Thompson. Rene Chouteau appeared for defendants. For the following reasons, the Court holds that defendants had probable cause to support the search warrant, but that they failed to comply with the knock-notice entry requirement.

I. FACTUAL BACKGROUND

Plaintiffs brought these actions under 42 U.S.C. § 1983 against certain Santa Rosa police officers who in March 1987 allegedly made various misrepresentations to obtain a search warrant for plaintiffs' residence, and then illegally executed the warrant.

The undisputed facts in this case are as follows:

Santa Rosa police officers Larry Mahre, Kent Knobelauch and James Camara were conducting an investigation into and surveillance relating to the sale of methamphetamine in March 1987. The investigation began when Sergeant Knobelauch received a phone call from a man stating that his daughter was using and selling drugs. Acting in an undercover capacity, Detective Mahre subsequently contacted the daughter, Christina Hoisington, and attempted to buy methamphetamine from her. Hoisington agreed to arrange a drug purchase, and told Mahre it would be accomplished through a woman named Sue Bond. Hoisington and Mahre thereafter drove in Mahre's car to Bond's residence on Lagner Road, accompanied by a blue pickup truck driven by an acquaintance of Hoisington's, Gary Denno, who also

sought to purchase methamphetamine. Sergeant Knobelauch and Detective Camara provided surveillance.

Following a discussion at Bond's residence, Hoisington and Bond informed Mahre that they had decided to obtain the methamphetamine from the residence of "Misfit Joe." Mahre recognized this name as the nickname of plaintiff Joseph Deshetres, a member of a local motorcycle gang called the Misfits. The group then proceeded to Deshetres' residence at 3365 Moorland Avenue as follows: Bond rode with Denno in the lead vehicle, a blue pickup, Detective Mahre and Hoisington followed in his car, and Sergeant Knobelauch and Detective Camara trailed the group in separate unmarked police cars.

The blue pickup stopped in the front yard area upon arriving at plaintiffs' residence. The officers then observed Bond leave the truck and walk towards the back of plaintiffs' residence, out of view of the surveillance team. Meanwhile, Hoisington and Detective Mahre drove by the residence and stopped at an area nearby, where Hoisington briefly left the car to make a phone call. Upon her return, she told Mahre that they should leave the scene and wait for the drugs at a nearby grocery store. He complied. Other officers observed Bond return and reenter the pickup truck. The pickup truck, with Detective Camara following, then drove from the residence to Highway 101, and proceeded to the Rohnert Park exit where it left the freeway and pulled into the parking lot of the Golden Penny Motel. During this journey, Detective Camara briefly lost sight of the blue pickup truck on two occasions, once on a freeway overpass and again at the point where the pickup exited the freeway and pulled into the nearby Golden Penny parking lot. After letting

Bond out at the motel, Denno drove the pickup truck back to the grocery store to meet Mahre. In the parking lot of the grocery store, Detective Mahre observed Denno give a package to Hoisington, who in turn gave it to Mahre. The package contained methamphetamine.

During these events, Detective Mahre had hidden on his person a transmitter to enable his conversations with Hoisington to be monitored and recorded by other officers. After Detective Mahre and Christina Hoisington had parted, the officers met and discussed the transaction that had just taken place. During this discussion the transmitter was inadvertently left on and recorded a frank discussion between officers Camara, Knobelauch, and Mahre, wherein they questioned whether sufficient probable cause existed for a search warrant of plaintiffs' residence. Specifically, they wondered how they were "going to make the money going in the house or the dope coming out of the house." To resolve these doubts, Sergeant Knobelauch consulted Sonoma County Assistant District Attorney Michael Mullins, who advised them to conduct further investigation of the connection between Joseph Deshetres and the Misfits motorcycle gang to strengthen their showing of probable cause.

Detective Mahre subsequently (1) examined Deshetres' arrest record, which included prior arrests for violent offenses and drugs; (2) learned from another police agency that officers had discovered methamphetamine during a previous search of plaintiffs' residence, although the source of this information has subsequently stated he does not recall providing Mahre with such information; and (3) learned that during

another police search of plaintiffs' residence Deshetres had reached for a loaded pistol.

Detective Mahre then prepared and submitted to Assistant District Attorney Michael Mullins a proposed search warrant and attached statement of probable cause setting forth the circumstances of the sale and incorporating the additional information. Mahre's statement of probable cause represented that while under police surveillance Sue Bond had "responded to the house" at 3365 Moorland Avenue. Mahre further represented that Bond was under "constant surveillance" while traveling from the Moorland Avenue residence to the Golden Penny Motel and back to the grocery store where Mahre ultimately received the drugs. Mullins reviewed the materials, approved the proposed warrant and statement of probable cause, and instructed Mahre to seek a warrant from a magistrate. The warrant was issued by the magistrate on March 16, 1987.

In the early morning hours of March 17, 1987, a SWAT team and a group of officers led by Sergeant Michael Steen executed the search warrant at plaintiffs' residence. While approaching 3365 Moorland Avenue, the officers observed a white pickup truck pulling out of plaintiffs' driveway. The officers further recognized the driver of the pickup as a member of the Misfits gang. Apparently spotting the police vehicles, the driver pulled back into plaintiffs' driveway, exited the truck and walked to the rear of the residence.

The police quickly surrounded the house. Sergeant Steen instructed the officers at the front door to make a forcible entry. At the time he gave this order, Officer

Edwin Hemphill had already knocked on the door and announced their presence. Some seven to ten seconds had passed with no response heard from the occupants of the house. At Steen's direction, the officers used a battering ram to break down the door and then entered the house. At the time Joseph Deshetres was in the bedroom with his girlfriend, Jeri Lynn Thompson, and her infant daughter Nicole.

Following plaintiff Deshetres' arrest, the Sonoma County Municipal Court suppressed all evidence provided by the warrant under California Penal Code § 1538.5 and dismissed the charges pending against Deshetres. The court found that the warrant was not supported by probable cause and that Mahre's affidavit contained representations intended to mislead the magistrate. The Court further found that the manner of entry into the residence also violated the Fourth Amendment because the officers used excessive force and did not give Deshetres an opportunity to voluntarily surrender. The court determined that no exigent circumstances existed on the morning of March 17, 1987, which could reasonably be construed to constitute an emergency.

Plaintiffs brought the present civil rights actions in federal court on March 10, 1989. The Court subsequently ruled on July 7, 1989, that genuine issues of material fact existed both as to the probable cause for the search warrant in this case and as to defendants' compliance with the knock-notice requirement during service of the warrant. The evidentiary hearing on these legal issues followed.

II. FINDINGS OF FACT

Having considered the evidence presented by counsel and heard their arguments regarding (1) the existence of probable cause to support the warrant and (2) defendants' compliance with the knock-notice entry requirement, the Court makes the following findings of fact. These factual findings supplement the undisputed facts recounted above.

1. Detective Mahre, who is an experienced narcotics officer in the Santa Rosa police department, harbored no intent to mislead either Assistant District Attorney Mullins or the magistrate when he used the term "responded to" to describe Sue Bond's approach of the plaintiffs' residence, as observed by the Santa Rosa police's surveillance team.

2. Detective Mahre harbored no intent to mislead either Assistant District Attorney Mullins or the magistrate when he represented in his affidavit that the blue pickup truck was under "constant surveillance" while it traveled from plaintiffs' residence to the Golden Penny Motel. However, Detective Mahre acted with reckless disregard of the truth in using this term to describe the police surveillance.

3. Detective Mahre orally informed Assistant District Attorney Mullins that the surveillance team did not actually observe Bond enter plaintiffs' residence.

4. Detective Mahre also informed Assistant District Attorney Mullins that the surveillance team briefly lost sight of the blue pickup truck and its occupants on two

occasions while the pickup traveled from plaintiffs' residence to the Golden Penny Motel, before rejoining Detective Mahre in the grocery store parking lot.

5. Although these lapses in surveillance provided an opportunity for the occupants of the pickup, Sue Bond and Gary Denno, to obtain methamphetamine from some source other than plaintiffs' residence, the possibility that such a quick drug transaction occurred undetected by the surveillance team is remote.

6. The totality of circumstances presented to the magistrate in Detective Mahre's affidavit establish a fair probability that a search warrant would uncover evidence of possession of methamphetamine for sale at plaintiffs' residence at 3365 Moorland Avenue.

7. Detective Mahre consulted in good faith with Assistant District Attorney Mullins regarding the legal sufficiency of Mahre's affidavit of probable cause.

8. The arrival of the Santa Rosa police at plaintiffs' residence to serve the search warrant was compromised by the driver of the white pickup truck, because that person had an opportunity to prematurely disclose the police approach to the residence.

9. The Santa Rosa police forcibly entered plaintiffs' residence only a short time – seven to ten seconds – after announcing their presence, based on Sergeant Steen's conclusion that such entry was necessary to provide officer safety and to prevent the destruction of evidence.

III. DISCUSSION

To state a claim under 42 U.S.C. § 1983 a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins,* 108 S. Ct. 2250, 2255 (1988). Section 1983 does not impose liability for violations of duties of care arising out of state tort law, *Baker v. McCollan,* 443 U.S. 137, 146 (1979), or for a state official's negligent acts that cause unintended loss of life, liberty or property. *Daniels v. Williams,* 474 U.S. 327, 328 (1986). In addition, liability may be imposed on an individual defendant only where the plaintiff can establish that the defendant proximately caused the deprivation of his constitutional rights. *Leer v. Murphy,* 844 F.2d 628, 634 (9th Cir. 1988).

In this case plaintiffs contend that defendants' unlawful entry into their residence violated their Fourth Amendment rights. As plaintiffs in a civil action, they bear the burden of proving by a preponderance of the evidence that such a violation occurred.

A. Probable Cause to Support the Search Warrant

Plaintiffs contend that the warrant obtained by defendants to search plaintiffs' residence lacked probable cause. This Court's analysis of probable cause is guided by the totality of circumstances approach adopted by the Supreme Court in *Illinois v. Gates,* 103 S. Ct. 2317 (1983).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in

> the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id., 103 S. Ct. at 2322. This Court must pay great deference to a magistrate's determination of probable cause and need only "ensure that the magistrate had 'a substantial basis for . . . conclud[ing]' that probable cause existed." *Id.* (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)).

In weighing the evidence supporting a request for a search warrant, the magistrate may rely on the conclusions of experienced law enforcement officers regarding where evidence of crime is likely to be found. *United States v. Fannin*, 817 F.2d 1379, 1380-81 (9th Cir. 1987). Direct evidence that contraband or evidence is located at a particular location is not essential to establish probable cause to search the location. *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986). Instead the issuing magistrate's decision should be a practical one, based in common sense. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876 (1986).

Where a challenge is made to the validity of a warrant affidavit, this Court must consider two factors to determine if a violation of Fourth Amendment rights occurred: (1) whether the alleged misstatements in the affidavit were made either intentionally or in reckless disregard for the truth, and if so, (2) whether, after deleting the misstatements or adding the omissions, the affidavit is insufficient to establish probable cause. *Franks v.*

Delaware, 98 S. Ct. 2674, 2676-77 (1978). *See also United States v. Davis*, 714 F.2d 896, 899 n.5 (9th Cir. 1983).

The theory underlying plaintiffs' probable cause argument is that defendants acted in bad faith in obtaining the search warrant in this case because of their excessive zeal in pursuing the Misfit motorcycle gang and its members. Plaintiffs allege that defendants used a small, isolated drug transaction that may have emanated from plaintiffs' residence as a pretext to mount an offensive against what they wrongly perceived to be the Misfit gang clubhouse. Plaintiffs specifically allege that Detective Mahre, under the supervision of Sergeant Knobelauch, withheld information and otherwise misled the Assistant District Attorney and the Magistrate in order to obtain a search warrant that lacked probable cause.

The crux of plaintiffs' contentions lies in two asserted misrepresentations from Mahre's affidavit supporting the search warrant.

First, Mahre stated that while under police surveillance, a white female later identified as Sue Bond exited the blue pickup truck and "responded to the residence at 3365 Moorland Avenue." Plaintiffs argue that this statement improperly suggests that Bond was seen entering plaintiffs' residence. In fact, the police observed Bond merely approaching the back of plaintiffs' residence after having parked in their driveway. It is thus possible that Bond never entered plaintiffs' residence, even though the house is isolated from other homes to the rear and on either side on Moorland Avenue. Plaintiffs further argue that defendants' motive in disguising the true facts is

revealed in their tape-recorded discussion, which makes clear that the officers understood that their failure to observe "the money going in the house or the dope coming out of the house" was problematic.

The Court is of the opinion that Mahre's use of the term "responded to" to describe Bond's approach of plaintiffs' residence in his affidavit was not made intentionally or in reckless disregard of the truth. The term appears throughout his affidavit, in a variety of contexts. For example, Mahre states that he "responded back" (i.e. physically returned) to the Santa Rosa police department after his initial meeting with Christina Hoisington, and that she later informed him that they were "responding over" (i.e. proceeding) to the residence at 3365 Moorland Avenue. Moreover, whether the drug transaction occurred inside or outside plaintiffs' residence is not legally significant so long as it occurred somewhere on the premises. If a drug transaction takes place in one portion of a premises, the entire premises may be searched for evidence of that drug transaction. *United States v. Roberts*, 747 F.2d 537, 543 (1986). In this case there is no other residence located behind or to the side of plaintiffs' home.

More troubling is the second of Mahre's alleged misrepresentations. In his affidavit Mahre claims that during the entire drug transaction the blue pickup truck driven by Gary Denno and its occupants "were under constant surveillance by members of the Santa Rosa Police Department" and that "at no time was the pickup truck out of view of the surveillance units." This is clearly false. The officer responsible for surveillance of the pickup truck, Detective Camara, states that there were in fact gaps in

his surveillance while the pickup traveled from plaintiffs' residence to the Golden Penny Motel. Camara further admits that the pickup was not under his surveillance when it first entered the Golden Penny parking lot, and that it is possible, though highly unlikely, that an exchange of drugs could have occurred there before he resumed visual contact with the pickup and its occupants. Camara communicated this knowledge to Mahre before the latter officer prepared his affidavit.

Defendants admit that Detective Mahre was aware of these assertedly minor gaps in surveillance, despite the representations in his affidavit. However, defendants contend that there was no ambiguity in their disclosure of information to Assistant District Attorney Mullins, in light of the fact that Mahre told Mullins of the exact nature of Detective Camara's surveillance. During the evidentiary hearing conducted by this Court, Mullins testified that he approved the warrant application despite knowing of these surveillance gaps because all of the other information presented made it probable that the drug transaction occurred at plaintiffs' residence and unlikely that it occurred elsewhere.

This Court finds that Detective Mahre acted with reckless disregard of the truth in representing to the magistrate that the blue pickup truck was under constant surveillance. However, the Court agrees with the Assistant District Attorney's determination that Detective Mahre's affidavit provided ample facts to support a search warrant of plaintiffs' residence, with or without the representations of constant surveillance. These facts include: (1) Mahre's substantial experience as a narcotics officer; (2) a statement from an unwitting informant,

Christina Hoisington, that the source of the methamphetamine was plaintiffs' residence; (3) the observation of Sue Bond while she parked in plaintiffs' driveway and walked towards the back of the residence, which stands apart from other residences on the street; (4) the circumstances and timing of the gaps in Detective Camara's surveillance of the blue pickup truck, as it traveled from plaintiffs' residence, to the Golden Penny, and finally to the grocery store where Mahre received the methamphetamine from Gary Denno through Christina Hoisington, were such that it is not reasonably probable that a transfer of narcotics occurred anywhere except plaintiffs' residence; and (5) plaintiff Deshetres' arrest record for drug offenses and violent crimes. These facts establish a fair probability that evidence of a crime would be found at plaintiffs' residence.

Accordingly, under the two-prong test enunciated in *Franks v. Delaware*, 98 S. Ct. at 2676-77, this Court upholds the validity of the warrant in question despite finding that Detective Mahre's affidavit omitted relevant facts as to surveillance through the use of false statements. The Court's decision is in accord with *United States v. Kirk*, 781 F.2d 1498 (11th Cir. 1986). In that case two government agents conducting surveillance lost sight of the suspects for an unstated but substantial period after the suspects entered a hotel, and again in a restaurant. The Eleventh Circuit upheld the search warrant despite the lapses in surveillance, finding that other possible sources of the drugs in question did not eliminate the substantial basis for probable cause that the drugs might be found in a residence targeted by the search warrant. *Id.*, 781 F.2d at 1505-06.

In sum, this Court holds that based on the totality of circumstances, plaintiffs have not carried their burden of establishing that the search warrant obtained by defendants was not supported by probable cause.

However, even if plaintiffs had satisfied their burden regarding probable cause, the Court is of the opinion that the officers who obtained the search warrant are protected from liability under the qualified immunity doctrine.

The individual police officer defendants in this case are entitled to qualified immunity if their search did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald,* 102 S. Ct. 2727, 2738 (1982). The test is one of objective reasonableness. *Malley v. Briggs,* 106 S. Ct. 1092, 1097-98 (1986). Officers exercising reasonable competence in obtaining a search warrant thus cannot be held liable for the violation of constitutional rights. *Forster v. County of Santa Barbara,* 90 C.D.O.S. 845 (9th Cir. February 7, 1990). Individual officers can buttress their claim of objectively reasonable conduct by consulting a district attorney before submitting the warrant to a magistrate. *Ortiz v. Van Auken,* 887 F.2d 1366, 1370-71 (9th Cir. 1989). Courts will generally not require officers to "second-guess the legal assessments of trained lawyers." *Arnsberg v. United States,* 757 F.2d 971, 981 (9th Cir. 1985), *cert. denied,* 475 U.S. 1010 (1986).

In this case the officers' conduct was objectively reasonable. Not only did they amass and present substantial information linking plaintiffs to the drug transaction in question, but Detective Mahre also prudently submitted

his affidavit in advance to the Assistant District Attorney. This Court finds that there was no misrepresentation and that there was full disclosure of facts known to police when they submitted the issue of probable cause to the Assistant District Attorney. His approval of the warrant application effectively immunizes the defendant officers, because district attorneys, and not police officers, are in the best position to evaluate when legal standards such as probable cause are satisfied. The individual officers thus conducted themselves with reasonable competence by following Assistant District Attorney Mullins' instructions to gather additional evidence, and then by acquiescing in his legal determination regarding probable cause.

B. The Knock-Notice Entry Requirement

The second issue presently before the Court is whether or not defendants violated the knock-notice entry requirement when executing the search warrant at plaintiffs' residence. Under California law this requirement is defined by statute:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose he is refused admittance.

Cal. Penal Code § 1531. Knock-notice rights are protected under the Fourth Amendment. *Ker v. California*, 83 S. Ct. 1623 (1963).

The rationale for requiring police officers to identify themselves and their purpose, and be refused admittance, before forcibly entering a residence is not to obtain a

consensual entrance, but rather to prevent precipitous action that violates the privacy of and endangers innocent persons who may be present within. *Duke v. Superior Court*, 1 Cal. 3d 314, 321 (1969). The appropriate time interval that an officer must wait, after announcing his or her presence and hearing no response from within, before breaking down a door is determined according to the exigencies of the particular situation facing the officer. *People v. Peterson*, 9 Cal. 3d 717, 722-24 (1973); *People v. Gallo*, 127 Cal. App. 3d 828, 838-39 (1981). The police's failure to comply with the knock-notice requirement in the absence of exigent circumstances renders the ensuing search unreasonable under the Fourth Amendment. *Duke v. Superior Court*, 1 Cal. 3d at 325; *Ker v. California*, 83 S. Ct. 1623. Exigent circumstances are limited to situations where officers have a reasonable and good faith belief that compliance with the knock-notice rule would increase their danger, frustrate an arrest, or result in the destruction of evidence. *Parsley v. Superior Court*, 9 Cal. 3d 934, 938 (1973).

The Court must resolve two issues in considering defendants' alleged violation of plaintiffs' Fourth Amendment rights in this case: (1) whether or not defendants' waiting period of seven to ten seconds before breaking into plaintiffs' residence was sufficient to comply with the knock-notice requirement; and (2) whether or not defendants' compliance was excused by exigent circumstances. Plaintiffs bear the burden of proof on both issues.

1. Compliance

The legal standard for compliance with the knock-notice requirement is clear. Where the police duly announce their identity and purpose, forcible entry is not permitted until the occupants of the premises are given an opportunity to first surrender the premises voluntarily. *People v. Neer,* 177 Cal. App. 3d 991, 995-96 (1986).

In this case Sergeant Steen initially intended to comply with the knock-notice rule. Believing that the police's presence had been prematurely disclosed while attempting to serve the warrant, however, Steen ordered entry of plaintiffs' residence based on exigency. The issue before the Court is thus whether or not the seven to ten second waiting period observed by Officer Hemphill and others before acting on Sergeant Steen's new orders represents the functional equivalent of compliance with knock-notice.

In resolving the compliance issue the Court considers the following circumstances. Service of the warrant occurred at 6:00 a.m. Plaintiffs were asleep in a bedroom towards the rear of the house at the time. Although plaintiffs may have heard defendants announce their presence from outside the front door, plaintiffs had no way of confirming who was at the door in the amount of time provided. Under these circumstances, seven to ten seconds was inadequate to imply a refusal by plaintiffs to consent to defendants' search of their residence.

Defendants urge the Court to consider the California Court of Appeal decision in *People v. Hobbs,* 192 Cal. App. 3d 959 (1987). In that case the court reasoned that implied refusal exists where there is an unreasonable delay in

responding to the police's announcement, and that the reasonableness of the delay cannot be quantified by measurement of time, but rather depends on all the circumstances of the case. *Id.* at 964. Based on this reasoning, the court held that a waiting period of only five seconds constituted an implied refusal.

This Court does not disagree with the decision in *Hobbs*. That case, however, presented very different facts from the present one. In *Hobbs*, the officers and the occupant of the house made visual contact through the doorway, and the officers could gauge by her reaction that she was unwilling to let them enter. In contrast, this case presents circumstances which explain a delay in responding to defendants' announcement. Defendants here knew that plaintiffs were likely to be asleep at 6:00 a.m., and they could not see plaintiffs' reaction to their announcement. Moreover, plaintiffs could not know for sure that it was the police who sought to enter. Defendants thus placed plaintiffs in the exact situation that the knock-notice rule was designed to prevent: one where an occupant might respond violently to a break-in of his house by unknown persons. *Accord, People v. Abdon*, 30 Cal. App. 3d 972 (1972) (waiting period of five to six seconds not sufficient to imply refusal where occupant was asleep at time of police announcement); *People v. Gonzalez*, 211 Cal. App. 3d 1043 (1989) (no implied refusal where police served warrant at 12:50 a.m. and waited only five seconds, despite knowing that occupant could not see them).

The Court therefore finds that, based on the circumstances of this case, defendants' decision to enter plaintiffs' residence after waiting only seven to ten seconds did not serve as the functional equivalent of compliance

with knock-notice. Given this finding, plaintiffs have established a violation of their Fourth Amendment rights implicated by the knock-notice requirement unless defendants' compliance was excused by exigent circumstances.

2. Exigent Circumstances

Defendants argue that the facts of this case do indeed give rise to exigent circumstances, in large part because their presence at plaintiffs' residence the morning of March 17, 1987 was prematurely disclosed by the driver of the white pickup truck. This premature disclosure, defendants contend, endangered the safety of the police officers in attempting to serve the search warrant and therefore excused compliance with Penal Code section 1531.

It is true that police officers are not required to comply with the knock-notice requirements when there are reasonable grounds to believe that compliance would endanger the officers. *People v. Bennetto,* 10 Cal. 3d 695, 700 (1974). However, such a belief "must be based on specific facts and not on broad, unsupported presumptions." *People v. Dumas,* 9 Cal. 3d 871, 878-89 (1973).

In this case Sergeant Steen had knowledge of the following specific facts at the time he served the warrant at plaintiffs' residence: (1) plaintiff Deshetres had an arrest record dating back fifteen years for various weapon and drug charges, but the most recent arrest, for armed robbery, was five years old; (2) nine years previous to the service of the warrant Deshetres had been arrested by the Santa Rosa police department while reaching for a handgun; (3) Deshetres was a member of the Misfit

motorcycle gang, which had a reputation for drugs and violence; (4) several vehicles had been parked alongside plaintiffs' residence a day or two before the service of the warrant, from which Sergeant Steen inferred that there might be as many as ten occupants of the house; (5) a single drug transaction involving methamphetamine was believe to have occurred at plaintiffs' residence earlier in the week; and (6) the police's presence at plaintiffs' residence was prematurely disclosed by the driver of the white pickup truck, who saw them approaching.

The issue before the Court is whether or not these specific facts support a reasonable belief that compliance with the knock-notice requirement would endanger the safety of the officers. Defendants contend that, based on these specific facts, Sergeant Steen and the men under his command expected substantial armed resistance from the occupants of plaintiffs' residence, and that this expectation was reasonable. This Court's careful analysis of these specific facts reveals that they support three key presumptions.

First, the facts support a reasonable belief that Deshetres would be inside the house when defendants served the search warrant on the morning of March 17, 1987. Sergeant Steen knew that Deshetres lived at 3365 Moorland Avenue and could reasonably expect that he would be sleeping in his own house at 6:00 a.m. Steen's expectation of finding as many as ten members of the Misfit motorcycle gang occupying the premises, however, was not reasonable. The only basis of this belief was his knowledge that Deshetres belonged to a motorcycle gang and that several cars had been parked alongside plaintiffs' residence one or two days before defendants served

the warrant. The evidence does not establish that several vehicles were parked at the residence site at the time of this incident. Although Steen may have believed that 3365 Moorland Avenue was the clubhouse of a motorcycle gang with a penchant for violence, and that this clubhouse would be occupied by as many as ten gang members, such belief was not based on specific facts or otherwise reliable information and therefore was not reasonable.

Second, the facts support a reasonable belief that Sergeant Steen's team would be met with armed resistance. Steen knew that Deshetres was housed within, and that he had a history of weapons offenses and a reputation for violence. On the other hand, Steen had no reliable evidence that other occupants would help Deshetres in resisting the police, or that Deshetres would be prepared to resist given the early morning time of the police's entry.

Third, the facts support a reasonable belief that plaintiffs received some warning, albeit a brief one, that police were approaching their residence. Sergeant Steen's intent to catch plaintiffs off guard was thus somewhat compromised. The record in this case indicates that although Steen intended to comply with the knock notice requirement, he altered his plans upon seeing that the police's approach was compromised by the driver of the white pickup. The assumed warning by the driver of the white pickup thus provided plaintiffs with approximately the same warning or opportunity to voluntarily surrender the premises as would have been provided by Sergeant Steen's compliance with the knock-notice rule.

In the opinion of the Court, the specific facts that support Steen's reasonable belief that plaintiffs' residence would be occupied by Deshetres when defendants executed the warrant, that Deshetres might react with armed resistance, and that Deshetres was given some warning of the police's approach, does not excuse his failure to comply with the knock-notice rule. These facts do not raise the presumption that officer safety was endangered to the point necessary for this Court to find that exigent circumstances existed. Likewise, defendants have not demonstrated exigent circumstances based on the possibility that plaintiffs would destroy evidence.

Defendants attempt to liken the circumstances of this case with the facts of *People v. Dumas*, 9 Cal. 3d 871 (1973). In *Dumas*, the police had reliable information that the householder routinely answered the door with a loaded pistol. The California Supreme Court therefore found that the presence of exigent circumstances excused the officers' compliance with knock-notice. In this case, however, Sergeant Steen had no similar evidence regarding Deshetres. Instead, Steen relied on information that on a single past occasion, Deshetres had reached for a gun while in the process of being arrested. Mere knowledge of a single such incident does not provide reasonable grounds for the police to believe that compliance with the knock-notice rule would endanger officer safety. *See People v. Bennetto*, 10 Cal. 3d at 700-01. This is particularly true in this case, where certain officers within the Santa Rosa police department, although not Sergeant Steen, knew that Deshetres had peaceably permitted police entry into the residence at 3365 Moorland Avenue only a year earlier.

Defendants further contend that Deshetres' history of weapons offenses led Sergeant Steen and others to reasonably expect the presence of guns within the residence. The specter of armed resistance does not, however, excuse compliance with section 1531. As stated by the California Supreme Court,

> one of the primary purposes of section 1531, in addition to the protection of individual privacy, is to prevent possible violent responses that might be aroused in a startled and fearful householder suddenly confronted with unknown persons breaking into his home for unannounced reasons [citation omitted]. The danger that such a confrontation will result in serious injury or death to the occupant, police officers, or innocent bystanders is obviously intensified when the householder is in possession of a firearm. Thus, where the police are aware of such a weapon, the case for requiring them to give notice of their authority and purpose becomes more rather than less compelling.

People v. Dumas, 9 Cal. 3d at 878. Accordingly, the mere knowledge that Deshetres was likely to keep a weapon in his residence provided Sergeant Steen with more and not less reason to comply with the knock-notice rule.

Lastly, defendants contend that the particular circumstances present upon the police's approach of 3365 Moorland Avenue, specifically the warning that plaintiffs may have received from the driver of the pickup truck, significantly increased the threat to officer safety. Defendants contention, however, ignores the fact that the warning of police presence they assume plaintiffs received in this

case is the equivalent of the circumstance of actual warning provided by knock-notice itself. The facts known to the police before arriving at plaintiffs' residence to execute the search warrant do not support exigent entry, and the additional fact of an assumed warning does not of itself, or in conjunction with the already known facts, justify an otherwise prohibited exigent entry. *Compare, e.g., People v. Tribble*, 4 Cal. 3d 826, 833 (1971) (exigent circumstances arose when serving the warrant where officers observed gun in suspect's car and heard sound of running footsteps as they approached the door).

With respect to exigent circumstances based on destruction of evidence, defendants had no information that plaintiffs had destroyed evidence on other occasions, nor did Sergeant Steen's decision to serve the warrant at daybreak encourage this possibility. Moreover, the rationale underlying the knock-notice rule specifically contemplates the existence of some opportunity for occupants of private residences to destroy evidence.

Accordingly, the Court holds that exigent circumstances did not exist at the time defendants served the search warrant at plaintiffs' residence.

VI. CONCLUSION

For all the foregoing reasons, the Court makes the following pre-trial rulings in these actions:

(1) The warrant underlying the search of plaintiffs' residence in March 1987 was supported by probable cause;

(2) The individual officers who obtained the warrant are shielded from liability under the qualified immunity doctrine;

(3) Defendants' failed to comply with the knock-notice requirement in effecting service of the warrant at plaintiffs' residence; and

(4) Defendants' failure to comply with knock-notice was not excused by exigent circumstances.

The Court will conduct a status conference for these actions on February 21, 1990, at 9:00 a.m.

IT IS SO ORDERED.

DATED: February 9, 1990.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH DESHETRES,
Plaintiff,
v.
LARRY WAYNE MAHRE et al.,
Defendants.

C-88-0875-DLJ

ORDER

FILED
JUL 7 1989

On March 1, 1989, this Court heard cross-motions for summary judgment plaintiff's cause of action under 42 U.S.C. section 1983. Plaintiff's pendant state law claims were not before the Court on summary judgment. Andrew Unetic and John Scott appeared for Plaintiff. Rene Chouteau appeared for Defendants.

For the following reasons, this Court (1) DENIES plaintiff's motion for partial summary judgment, against the individual police officers, on the issue of probable cause to support the search warrant, compliance with the knock-notice entry requirement, and the validity of the nighttime service endorsement on the search warrant; (2) DENIES plaintiff's motion for partial summary judgment, against the City of Santa Rosa and the Santa Rosa Chief of Police, on the issue of municipal and supervisory liability; (3) DENIES defendants' motion for partial summary judgment on the issue of probable cause supporting the search warrant and compliance with the knock-notice entry requirement; and (4) GRANTS defendants' motion for partial summary judgment on the issue of the validity

of the nighttime service endorsement on the search warrant.

I. FACTUAL BACKGROUND

In March 1987, Sergeant Knobelauch, of the Santa Rosa Police Department, received a phone call from Christina Hoisington's father, who expressed concern that his daughter was using and selling drugs. Sergeant Knobelauch assigned Detective Mahre to contact Christina Hoisington.

Detective Mahre went to her house and attempted to buy methamphetamines. Hoisington agreed and asked Mahre to drive her to a house on Lagner Road where she could obtain the drug from a woman named Sue Bond. As they drove to Lagner Road, they were followed buy a blue pickup truck containing Gary Denno and Tanya Ell, two of Hoisington's acquaintances who also wanted to buy some methamphetamines. Sergeant Knobelauch and Detective Camara provided surveillance.

At Lagner Road, Hoisington talked with Bond and then told Mahre that Bond was going to obtain the methamphetamine from Misfit Joe's house. Mahre recognized this name as the nickname of plaintiff Joseph Deshetres, a member of the Misfits Outlaw Motorcycle Gang.

Bond then drove in the blue pickup truck driven by Denno to plaintiff's residence at 3365 Moorland Avenue. Mahre and Hoisington, as well as the surveillance officers, followed the pickup. At Moorland Avenue, Denno parked in the driveway and Bond walked toward the

back of the house. The residence at 3365 Moorland Avenue is isolated and no other residences are immediately adjacent.

A short time later, Bond returned from around back of the house and got back in the pickup truck. Hoisington told Mahre to drive to the market on the corner and wait for the drugs. Detective Camara meanwhile followed the pickup to the Gold Penny Motel where Sue Bond got out. The pickup returned to the corner market. Gary Denno delivered a package of methamphetamine to Hoisington, who in turn gave it to Mahre. Hoisington then got in the pickup with Denno and Ell. The three were subsequently stopped and arrested.

During these events, Detective Mahre carried a transmitter on his person. This transmitter recorded a frank discussion between Mahre, Knobelauch, and Camara, during which they expressed doubts as to whether they had sufficient probable cause to obtain a search warrant for plaintiff's house. Specifically, they questioned how they were "going to make the money going in the house or the dope coming out of the house."

To resolve these doubts, Knobelauch contacted Assistant District Attorney Mullins, who advised that they conduct further investigation to tie Misfit Joe to Joe Deshetres and Joe Deshetres to the Misfits Motorcycle Gang. During this investigation, Mahre (1) examined plaintiff's arrest record, which showed a number of arrests for violent offenses and drugs; (2) talked to Deputy Anderson about the discovery of methamphetamines during a search of plaintiff's house over 1½ years ago, but Anderson denies ever making this statement; (3)

talked to Officer McMahon who stated that during a prior search, plaintiff was reaching for a loaded pistol as police entered his bedroom.

After completing this additional investigation, Mahre prepared a search warrant endorsed for night service and a statement of probable cause, which he submitted to Mullins for review. During this review, Mahre told the Assistant District Attorney that the officers never saw Bond actually enter plaintiff's residence. Mullins determined that probable cause existed and instructed Mahre to take the affidavit to the magistrate. On March 17, 1987, at approximately 6:00 a.m., a group of police officers led by SWAT teams executed the warrant.

While approaching plaintiff's residence to execute the search warrant, officers observed a white pickup pull partially out in the roadway and then back into the driveway. The vehicle then pulled out again into the roadway and, upon observing several approaching police vehicles, again backed into the driveway. The driver exited the vehicle and moved rapidly towards the rear of plaintiff's house.

Plaintiff, his girlfriend, and her baby, were sleeping in the house. They effected entry by breaking in with a battering ram.

Following plaintiff's arrest and arraignment, the Sonoma County Municipal Court held an eight-day hearing on a motion to suppress pursuant to California Penal Code section 1538.5. On September 30, 1987, the court dismissed the charges pending against plaintiff and suppressed all evidence obtained pursuant to the search warrant. The court held that the search warrant was not

supported by probable cause and the search therefore violated plaintiff's Fourth Amendment rights. The court found that the affidavit contained representations intended to mislead the magistrate, that such misrepresentations were made with reckless disregard for the truth, and that no good faith existed on Mahre's part to warrant excusing the misrepresentations.

The Court further found that the manner of entry into plaintiff's home violated the Fourth Amendment because the officers did not give plaintiff an opportunity to voluntarily surrender and used excessive force to effect the entry. The court determined that no exigent circumstances existed which could reasonably be construed to constitute an emergency and that the officers did not act in good faith in reliance upon any such circumstances.

On October 7, 1987, the prosecution filed a motion in Sonoma County Superior Court to reinstate the complaint against plaintiff pursuant to Penal Code section 871.5. On February 10, 1988, the Judge denied the motion. The court ruled that no probable cause for the search warrant existed.

Plaintiff has filed suit under 42 U.S.C. § 1983 against the Santa Rosa Police Department law enforcement officers responsible for obtaining and executing the search warrant, the City of Santa Rosa and the Santa Rosa Chief of Police, Salvatore Rosano.

II. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c).

In a motion for summary judgment, the moving party bears the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

However, once the moving party meets its burden, the nonmoving party may no longer rely on allegations in the pleadings to preclude summary judgment. 809 F.2d at 630. Summary judgment may issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the buren [sic] of proof at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986).

iII. LIABILITY OF INDIVIDUAL POLICE OFFICERS

Plaintiff moves for summary judgment on his section 1983 claim, against the seven individual police officers allegedly responsible for obtaining and executing the search warrant, on grounds that the officers: (1) obtained a search warrant not supported by probable cause; (2) executed a search warrant improperly endorsed for nighttime service; and (3) failed to comply with the knock-notice entry requirement.

Defendants move for summary judgment, on the section 1983 claim, on grounds that: (1) the search warrant was supported by probable cause; (2) nighttime service of the search warrant was proper; and (3) there was compliance with the knock notice entry requirement.

A. Probable Cause to Support Search Warrant

1. collateral estoppel

Plaintiff's central argument in support of his motion for summary judgment is based on the doctrine of collateral estoppel. Plaintiff argues that the state court's ruling, that the search warrant was not supported by probable cause, precludes defendants from again relitigating this issue. This Court disagrees.

In a section 1983 action, federal courts are to look to state law in applying the collateral estoppel doctrine. *Allen v. McCurry,* 449 U.S. 90 (1980). Under California law, several requirements must be met in order to assert collateral estoppel. First, there must be a final judgment on the merits. Second, the issues decided in the prior adjudication must be identical to the issues raised in the current action. Third, the party against whom collateral estoppel is asserted must be a party or in privity with a party to the prior action. *Bernhard v. Bank of America,* 19 Cal. 2d 807, 813 (1942). The burden of proof is on the party asserting collateral estoppel. *Haung Tang v. Aetna Life Ins. Co.,* 523 F.2d 411 (9th Cir. 1975).

In *Heath v. Cast,* 813 F.2d 254. 258 (9th Cir. 1987), the Ninth Circuit which held that motions to suppress evidence under section 1538.5 are not considered final

judgments under California law for collateral estoppel purposes. Since the state court's ruling on the motion to suppress is not a final judgment on the merits under *Heath*, plaintiff has failed to satisfy the first requirement for the application of the doctrine of collateral estoppel. This Court therefore need not reach the questions of issue identity or privity. This Court notes, however, that the requirement of privity would also prevent the application of collateral estoppel, since the individual police officers who were connected with the narcotics investigation, and obtaining the search warrant, were neither parties to nor directly represented in plaintiff's criminal prosecution.

2. de novo review

Plaintiff alternatively argues that summary judgment, on the section 1983 claim against the individual officers, is proper because a *de novo* review by the Court will establish that the search warrant was not supported by probable cause. This Court disagrees.

a. qualified immunity

Even if the officers lacked probable cause to obtain the search warrant, plaintiff would not be entitled to summary judgment against the officers if a genuine issue of fact as to their good faith in obtaining the search warrant exists. *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). This Court concludes that the actions of Sergeant Knobelauch and Detective Mahre and Camara, in taking their case to the Assistant District Attorney for his opinion regarding the existence of probable cause for issuance

of the warrant and in conducting a further investigation before approaching the magistrate, creates such an issue.

In *Harlow*, the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The question of qualified immunity is one of reasonableness – would a reasonable person in the shoes of the officers have known he was violating the constitutional rights of another? *Id.* Since this determination turns on the reasonableness of the officers conduct in obtaining the search warrant, a genuine issue of material fact remains for trial. *See Celotex*, 106 S. Ct. at 2553; Fed. R. Civ. Proc. 56(c).

Accordingly, plaintiff's motion for summary judgment on the issue of probable cause to support the search warrant is DENIED. Defendants' motion is also DENIED.

B. Compliance with Knock-Notice Entry Requirement

Plaintiff argues he is entitled to summary on the section 1983 claim, against the police officers who executed the search warrant, on grounds that they failed to comply with the knock-notice entry requirement. This Court disagrees for two reasons.

1. personal participation

Section 1983 only imposes liability for "conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." *Rizzo v. Goode,* 96 S. Ct. 598, 604 (1976) (citing 42 U.S.C. § 1983). Plaintiff's argument for summary judgment fails to appreciate that the language of section 1983 demands a degree of personal involvement connecting a defendant to the claimed deprivation of a constitutional right. The doctrine of respondeat superior has no application under this section. *Monell v. N.Y. City Dept. of Social Services,* 98 S. Ct. 2018 (1978).

Although plaintiff correctly points out that knock-notice is a fundamental Fourth Amendment right recognized by the Supreme Court, the Ninth Circuit and the California Supreme Court, *Ker v. California,* 835 S. Ct. 1623 (1963), *United States v. Bustamante-Gamez,* 488 F.2d 4 (9th Cir. 1973), *Duke v. Superior Court,* 1 Cal 3d 314 (1959), plaintiff has failed to produce any evidence showing that each individual police officer acted with the purpose of violating his constitutionally protected right. Absent an evidentiary showing linking each police officer, in terms of their state of mind and conduct to the alleged constitutional violation, plaintiff's motion for summary judgment on the knock-notice issue must fail.

2. noncompliance excused

In *Ker,* the Supreme Court made clear that exigent circumstance would authorize noncompliance with the

California knock-notice statute.[1] The record in this case clearly presents a disputed issue of fact as to whether, in light of the particular circumstances surrounding the execution of the search warrant, the officers were justified for failing to give proper notice. Specifically, the evidence shows that the officers had reason to believe that the driver of the white pickup had prematurely disclosed their presence to plaintiff. In addition, the evidence shows that the officers had reason to believe that plaintiff, and other members of the Misfit Motorcycle Gang thought to be occupying the house, had a propensity for violence. Although the officers did effect entry with a battering ram, a genuine issue of material fact exists as to whether exigent circumstances justifying such an entry were present.

For these reasons, this Court DENIES both plaintiff's and defendants' motion for summary judgment on the knock-notice issue.

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[1] The knock-notice requirement under California law is set forth in section 1531 of the Penal Code. That section provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose he is refused admittance."

Cal. Pen. Code § 1531.

C. NightTime Service of the Search Warrant

Both plaintiff and defendants argue they are entitled to summary judgment on the issue of whether the affidavit demonstrated reasonable cause for issuance of a nighttime service endorsement on the search warrant.

Under California Penal Code section 1533, a magistrate may upon a showing of good cause authorize nighttime service of a search warrant. As amended in 1986, section 1533 permits consideration of the safety of police officers serving the warrant and the safety of the public as factors establishing good cause for night service. The court in *People v. Kimble*, 44 Cal. 3d 480, 495 (1988) also recognized police officer and public safety as a basis for night service.

Defendants argue that summary judgment is proper because the statement of probable cause demonstrated good cause for issuance of a nighttime service endorsement on the warrant. Specifically, defendants point to plaintiff's propensity for violence as well as the fact that service at dawn heightens the chances that individuals in the residence would be asleep and less likely to obtain weapons. In addition, defendants point out that, in the early morning hours, vehicle and pedestrian traffic in plaintiff's neighborhood is limited.

Although defendants have come forward with evidence demonstrating that the night search was designed to minimize the risk of physical harm to police officers and passerbys, plaintiff has failed to meet his burden under Celotex by placing in dispute defendants' evidence of good cause for nighttime service. 106 S. Ct. 2548,

2552-53 Accordingly, this Court GRANTS defendants' motion for summary judgment on the issue of nighttime service.

IV. MUNICIPAL LIABILITY

Plaintiff has filed a supplemental brief in which he moves for summary judgment on his section 1983 municipal liability claim against the City and supervisory liability claim against the Chief of Police, Salvatore Rosano. No cross-motion for summary judgment has been filed.

A. Liability of City Santa Rosa

Plaintiff argues that he is entitled to summary judgment, on his section 1983 claim against the City of Santa Rosa, under *Pembauer v. Cincinnati*, 106 S. Ct. 1292 (1986). Specifically, plaintiff contends that liability should be imposed on the City for the decision of officers Mahre, Knobelauch, and Camara, in obtaining a search warrant not supported by probable cause. Plaintiff alleges that Chief Rosano, in his deposition, testified that these officers were the officials responsible for establishing final policy with respect to obtaining the search warrant.

Although plaintiff is correct that municipal liability may be imposed under *Pembauer* for a single decision by municipal policy makers, plaintiff fails to appreciate that municipal liability attaches only under *Pembauer* where the decision maker possess final authority to establish

final policy with respect to the action ordered. *Id.* at 1299.[2]

This Court holds that plaintiff has failed to establish that officers Mahre, Knobelauch, and Camara, possess the final policymaking authority contemplated by *Pembauer.* Contrary to plaintiff's contention, Chief Rosano's deposition testimony, that "we don't restrict any officer from presenting an affidavit," does not establish that the officers had final policymaking authority. That the officers meet with the Assistant District Attorney for guidance on obtaining the search warrant further supports this Court's conclusion that they lacked the type of final decision making authority required by *Pembauer.* Plaintiff's motion for summary judgment on the section 1983 claim against the City is therefore DENIED.

B. Liability of Chief of Police

Plaintiff argues that he is entitled to summary judgment on his section 1983 claim against the Chief of Police based on his alleged failure to investigate the incident at issue and discipline the responsible officers. As support, plaintiff relies on *McRorie v. Shimoda,* 795 F.2d 780 (9th Cir. 1986), where the court held that a policy or custom may be inferred if no steps are taken to reprimand or discharge.

This Court finds plaintiff's argument for supervisory liability under *McRorie* unconvincing. In his deposition, Chief Rosano testified that he did impose discipline

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[2] "Policy" generally implies a course of action chosen from among various alternatives. *Id.* at 1300

where he thought that discipline was due. Although he did not punish the officers for every alleged infraction, he did punish them for taking pictures on plaintiff's motorcycle after the search. Genuine issues of material fact remain unresolved with respect to the Chief's conduct. *See Celotex*, 106 S. Ct. at 2553, Fed. R. Civ. Proc. 56(c).

Accordingly, plaintiff's motion for summary judgment on the section 1983 claim against the Chief of Police is DENIED.

V. CONCLUSION

For all of the foregoing reasons, this Court (1) DENIES plaintiff's motion for partial summary judgment on the issue of probable cause to support the search warrant, compliance with the knock-notice entry requirement, and the validity of the nighttime service endorsement on the search warrant; (2) DENIES plaintiff's motion for partial summary judgment, against the City of Santa Rosa and the Santa Rosa Chief of Police, on the issue of municipal and supervisory; (3) DENIES defendants' motion for partial summary judgment on the issue of probable cause supporting the search warrant; and (4) GRANTS defendants' motion for partial summary judgment on the issue of the validity of the nighttime service endorsement on the search warrant.

IT IS SO ORDERED:

DATED: July 7, 1989.

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

STATE OF CALIFORNIA
COUNTY OF SONOMA
SEARCH WARRANT
(Endorsed Filed 3-27-87)

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Sonoma:

PROOF, by affidavit, having been made before me by Detective Larry Mahre that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below by "x"(s) in that it:

_____ was stolen or embezzled

_____ was used as the means of committing a felony

__X__ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery

__X__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED TO SEARCH the premises located at and described as The premises located at and described as 3365 Moorland Avenue, Santa Rosa, California; a two story single family dwelling with brown colored wood siding and a brown shingle roof. The residence is on the west side of Moorland Avenue and is

situated approximately yards north of the intersection of Moorland Avenue and W. Robles Avenue. The front door of the residence is colored brn and faces east, and is situated on the east side of the residence. A mailbox directly across the street has the numbers 3365 upon it. No distinguishable numbers are attached to the residence itself. The residence and surrounding grounds are further distinguished by several tall palm trees growing on the proeprty [sic]. These palm trees are responsible for the labeling name of "The Palms." "The Palms" is a commonly known namegiven [sic] to the residence by the residents occupying it and the palm trees plainly distinguish the residence from any other in the area. A photograph of the residence is attached to this affidavit and marked as Exhibit I; and all rooms, attics, basements, and other parts therein and the surrounding grounds and any garages, storage areas, and outbuildings of any kind located thereon.

and the vehicle(s) described as

and the person(s) of

for the following property: methamphetamine and paraphernalia related to the sale and storage of methamphetamine, such as plastic baggies, paper bindles, paper envelopes and other weighing containers commonly associated with the packaging and storage of methamphetamine; scales and other weighing devices commonly used to prepare amounts of methamphetamine for sale; and paraphernalia related to the use of methamphetamine such as plastic straws, razor blades, mirrors, hypodermic syringes, cotton and other various

paraphernalia commonly associated with the use of methamphetamine; and articles of personal property tending to establish and document sales of methamphetamine, such as U.S. currency, buyers lists, sellers lists and recordations of sale; and articles of personal property tending to establish the existence of a conspiracy to sell methamphetamine, such as personal telephone books, address books, telephone bills, papers and documents containing lists of names; and articles of personal property tending to establish the identities of the persons in control of the premises, such as as [sic] utility company receipts, rent receipts, addressed envelopes, keys; articles of personal property such as articles of clothing upon which is attached or sewn "Misfit Motorcycle Club" insignias and related paraphernalia which includes "colors" and associated "patches"; such as printed documents, handwritten notes and papers, cards books, flags, penants [sic], logos, insignias and photographs, other forms of communication and advertisement which would tend to show membership in, or sponsorship of the Misfit Motorcycle Club; and U.S. currency with the following serial numbers: 4 – $20.00 bills with the following serial numbers: L39939026B, G37854665D, B13863275A, J41509695A; also to listen to, note and record any messages left on any telephone answering devices or machine inside the location, or answer any telephone calls during the service of the search warrant; and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 16 day of March, 1987 at 4:30p.m.

/s/ F.J. Passalacqua
Signature of Magistrate
Judge of the Municipal Court

NIGHTTIME SERVICE ENDORSEMENT*

GOOD CAUSE HAVING BEEN SHOWN BY AFFIDAVIT, THIS WARRANT CAN BE SERVED AT ANY TIME OF THE DAY OR NIGHT.

/s/ F.J. Passalacqua
Endorsement of Magistrate
for Nighttime Service

STATE OF CALIFORNIA

COUNTY OF SONOMA

AFFIDAVIT FOR SEARCH WARRANT

(Endorsed Filed 3-27-87)

Detective Larry Mahre, being sworn, says that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to

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* Unless endorsed for nighttime service, this warrant can be served only between the hours of 7:00 a.m. and 10:00 p.m.

BEST AVAILABLE COPY

Penal Code Section 1254 in that it: (CHECK APPROPRIATE BOX(S)

_____	was stolen or embezzled
_____	was used as the means of committing a felony
X	is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
X	is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH the premises located at and described as The premises located at and described as 3365 Moorland Avenue, Santa Rose, California; a two story single family dwelling with brown colored wood siding and a brown shingle roof. The residence is on the west side of Moorland Avenue and is situated approximately yards north of the intersection of Moorland Avenue and W. Robles Avenue. The front door of the residence is colored brn and faces east, and is situated on the east side of the residence. A mailbox directly across the street has the numbers 3365 upon it. No distinguishable numbers are attached to the residence itself. The residence and surrounding grounds are further distinguished by several tall palm trees growing on the proeprty [sic]. These palm trees are responsible for the labeling name of "The Palms." "The Palms" is a

BEST AVAILABLE COPY

commonly known namegiven [sic] to the residence by the residents occupying it and the palm treesplainly [sic] distinguish the residence from any other in the area. A photograph of the residence is attached to this affidavit and marked as Exhibit I; and all rooms, attics, basements, and other parts therein and the surrounding grounds and any garages, storage areas, and outbuildings of any kind located thereon.

and the vehicle(s) described as

and the person(s) of

for the following property: methamphetamine and paraphernalia related to the sale and storage of methamphetamine, such as plastic baggies, paper bindles, paper envelopes and other weighing containers commonly associated with the packaging and storage of methamphetamine; scales and other weighing devices commonly used to prepare amounts of methamphetamine for sale; and paraphernalia related to the use of methamphetamine such as plastic straws, razor blades, mirrors, hypodermic syringes, cotton and other various paraphernalia commonly associated with the use of methamphetamine; and articles of personal property tending to establish and document sales of methamphetamine, such as U.S. currency, buyers lists, sellers lists and recordations of sale; and articles of personal property tending to establish the existence of a conspiracy to sell methamphetamine, such as personal telephone books, address books, telephone bills, papers and documents containing lists of names; and articles of personal property tending to establish the identities of the persons in control of the premises, such as as [sic] utility company receipts, rent

receipts, addressed envelopes, keys; articles of personal property such as articles of clothing upon which is attached or sewn "Misfit Motorcycle Club" insignias and related paraphernalia which includes "colors" and associated "patches"; such as printed documents, handwritten notes and papers, cards, books, flags, penants [sic], logos,

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE consisting of 10 pages, which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a search warrant be issued for the seizure of said property or any part thereof, at any time of the day *OR NIGHT**, good cause therefore having been shown.

/s/ Larry W. Mahre
Signature of Affiant

Subscribed and sworn to before me this 16 day of March, 1987.

/s/ F.J. Passlacqua
Signature of Magistrate
Judge of the Municipal Court

Prepared with the assistance of or reviewed by:

/s/ J. Michael Mullins
Deputy District Attorney

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* Strike *OR NIGHT* if not applicable.

STATEMENT OF PROBABLE CAUSE

Your affiant is a police officer employed by the Santa Rosa Police Department and has been so employed for the past twelve years. Your affiant has been assigned to the Narcotics/Vice Unit for a total of eighteen months. Your affiant has had previous experience with the Santa Rosa Police Department as an investigator from the period of October, 1977 through March 1981. Your affiant has been assigned to investigate juvenile, burglary and violent crimes. Your affiant attended a sixteen week basic academy at Los Guilucos, Santa Rosa in 1975. Your affiant has completed the following schools in relation to narcotics/vice: July, 1983; a twenty hour course in narcotics enforcement for peace officers put on by the Department of Justice; September, 1985: an eighty hour narcotics investigations course put on by the Department of Justice; September, 1985: a narcotics and drug investigation eight hour course put on by Valtox Laboratories in Sacramento; January, 1986: a forty hour course of narcotic investigation as it relates to asset forfeiture and seizure put on by the Department of Justice; in 1986 a thirty two hour course on informant maintenance and development put on by the Department of Justice; in 1986 a forty hour course in clandestine laboratory investigation put on the the [sic] Department of Justice; in 1986 a thirty two hour course in advanced asset forfeiture investigation put on by the Department of Justice; in 1986 a forty hour course of narcotic investigation as it relates to individuals under the influence of narcotics put on by the Department of Justice; in 1987 a forty hour course of criminal intelligence put on by the Department of Justice; in 1987 a forty hour course as it relates to vice investigations put

on by the Department of Justice at the San Jose Police Department. Your affiant has developed contacts with narcotic experts, narcotic users, narcotic sellers and narcotic informants and discussed with them the aspects of sales, use packaging and trafficking of narcotics in the northern California area.

Your affiant has participated in excess of 100 narcotic-related investigations and has participated in over 100 hundred arrests for persons in violation of narcotics laws.

On 3-13-87 at approximately 1440 hours, your affiant was advised by Sergeant Knobelauch of the Santa Rosa Police Department's Narcotics Unit that an individual known to him by the name of "Christina" who was living at 240 Burt Lane, #296, in Santa Rosa, was involved in the dealing of methamphetamine.

At approximately 1510 hours your affiant left the Santa Rosa Police Department and responded to the area of 240 Burt Lane, #296, to attempt to meet the individual "Christina." Also in the area were Sergeant Knobelaugh and Detective Camara. At 1520 hours your affiant was advised by Sergeant Knobelaugh that the individual "Christina" was sitting on the curb in the parking lot of 240 Burt Lane with 3 small children. At 1522 hours your affiant met with "Christina." After a brief discussion your affiant determined that "Christina" was in fact involved in the dealing of methamphetamine. Your affiant then ordered one gram of methamphetamine from "Christina." The selling price was to be $80.00. "Christina," who was later identified to be a Christina Hoisington, stated further that she was baby sitting and would not be available to obtain the methamphetamine for approximately 30

minutes. Your affiant then advised Christina Hoisington that your affiant would be back in approximately 30-40 minutes. Your affiant then left the area and responded back to the Santa Rosa Police Department. At the Santa Rose Police Department your affiant then placed a transmitting device on his person. At approximately 1610 hours your affiant left the Santa Rosa Police Department en route to Christina Hoisington's apartment. Standing by the area was Sergeant Knobelauch and Detective Camara. Detective Camara was monitoring the transmitting device. At approximately 1624 hours your affiant arrived back at 240 Burt Lane, #296. Your affiant went up to the door and knocked on the door. Christina Hoisington at that time was not there. A few minutes later Christina Hoisington arrived at her residence. Christina Hoisington then advised your affiant that she was leaving again to find "Sue." "Sue" being Christina Hoisington's connection as to where she was going to get the methamphetamine. Christina Hoisington further advised your affiant that "Sue" would be over by where Christina Hoisington used to live on Langner Road. Christina Hoisington further advised your affiant that she would be back in approximately 20 minutes.

At 1707 hours Christina Hoisington arrived back at her residence. Christina Hoisington further advised your affiant that "Sue" had the methamphetamine but that we would have to go to pick it up at her friend's house on Langner Road. At this time a blue pickup arrived and parked in the parking lot by Christina Hoisington's apartment. The pickup was a 1970 Ford Fleetside pickup, California license 1NRA999. In the pickup was a white male driver, later identified as Gary Denno and a Tanya

Ell. Christina Hoisington further advised your affiant that the individuals in the pickup wanted some meth-amphetamine also. Christina Hoisington then walked over and spoke to the individuals in the truck and then responded back and met with your affiant. Christina Hoisington advised your affiant that the two individuals in the truck would follow us.

At approximately 1710 hours our affiant and Christina Hoisington with the blue pickup following left the Burt Lane address. While en route to the residence on Lagner, Christina Hoisington asked your affiant "Do you toot it or slam it?" Through your affiant's training and expertise, your affiant knows the word "toot" to be a street term for snorting a narcotic, and the word "slam" to be a street name for injecting the narcotic intravenously. Your affiant then advised Christina Hoisington that your affiant "tooted" the methamphetamine. Christina Hoisington then advised your affiant that the methamphetamine was good for "tooting" but not for "slamming."

At approximately 1717 hours your affiant, along with Christina Hoisington and the blue pickup truck arrived at a residence at the north end of Langer Road. Christina Hoisington then got out of your affiant's vehicle and walked to the residence. A short time later Christina Hoisington responded back to your affiant. Christina Hoisington then advised your affiant that her connection, who was told to me to be the name of "Sue," needed to go to get the methamphetamine. Christina Hoisington advised your affiant that "Sue," did not have an entire gram on her at the time, and that we were responding over to a residence on Moorland Avenue. Christina Hoisington further advised your affiant that your affiant

could follow "Sue" and that she could get the whole gram at that time. Christina Hoisington also advised your affiant that "Sue" was going to get some methamphetamine for herself as well. Christina Hoisington further advised your affiant that your affiant would be responding over to "Misfit Joe's" house on Moorland Avenue. Your affiant is aware that the name "Misfit Joe" is a nickname for Joseph Deshetres who resides at 3365 Moorland Avenue. Christina Hoisington further advised your affiant that your affiant would be following "Sue" over to this location on Moorland Avenue. Christina Hoisington further advised your affiant that "Sue" would need the money for the methamphetamine prior to entering the house. Your affiant then gave Christina Hoinsington $80.00 in pre-recorded City funds. Christina Hoisington then left your affiant's vehicle and went over to the blue pickup truck and handed the money to the driver, later identified as Gary Denno. Also in the vehicle now, besides the original two individuals, was a white female who Christina Hoisington stated and talked to was "Sue.".

At approximately 1736 hours your affiant, along with Christina Hoisington, left Langner Road and headed towards Moorland Avenue. At approximately 1741 hours your affiant and Christina Hoisington arrived in front of 3365 Moorland Avenue. In the driveway was the blue pickup truck. The third individual by the name of "Sue" was no longer in the truck. The other two occupants were still in the truck. Christina Hoisington then advised your affiant that that was the residence that "Sue" would be getting the methamphetamine from. I was later advised by Sergeant Knobelauch and Detective Camara that a white female got out of the pickup truck and responded

to the residence at 3365 Moorland Avenue. Christina Hoisington then instructed your affiant to drive up and down Moorland Avenue a few times to wait for "Sue" to exit the residence. While waiting, Christina Hoisington advised your affiant to pull up in front of a residence on Eddy Drive. Christina Hoisington further advised your affiant that she believed she remembered the telephone number of the residence where "Misfit Joe" lived and that she would attempt to call "Sue" there at that residence to have "Sue" meet us at this residence on Eddy Drive. Christina Hoisington then left your affiant's vehicle and went into the residence. A few minutes later Christina Hoisington responded back to your affiant's vehicle and stated that she could not remember the number. Christina Hoisington then advised your affiant to have your affiant drive to the market at Moorland and Todd and wait there. As your affiant drove by the residence at 3365 Moorland Avenue the blue pickup was now gone. Your affiant was later advised by Sergeant Knobelauch and Detective Camara that the white female then re-entered the pickup and the pickup left southbound on Moorland Avenue. Detective Camara followed the pickup from Moorland Avenue to the Golden Penny Inn in Rohnert Park. Detective Camara advised me that the pickup stopped at the Golden Penny and the white female known as "Sue" got out of the pickup. The pickup then responded back to the market at Moorland and Todd Road. At approximately 1817 hours the pickup arrived at the market. Your affiant then pulled up alongside the pickup truck. The driver of the pickup truck then exited the vehicle and walked to your affiant's vehicle. The driver of the vehicle then handed Christina Hoisington a plastic bag containing a

white powdery substance. Christina Hoisington then handed the plastic bag containing the white powdery substance to your affiant. Christina Hoisington then got out of your affiant's vehicle and left with the blue pickup truck. Your affiant then responded back to the Santa Rosa Police Department and conducted a valtox presumptive test on the white powder found inside the plastic bag and got a positive reaction for methamphetamine.

The blue pickup was then followed by Sergeant Knoblelauch and Detective Camara along with marked units of the Santa Rosa Police Department after it left your affiant. The blue pickup truck was subsequently stopped on Santa Rosa Avenue at Plaza Drive. The driver of the pickup truck, a Gary Denno, was subsequently arrested for traffic warrants. Also located in his possession was a clear plastic baggie containing a white powder. A Valtox presumptive test of the white powder was completed, with a positive reaction for methamphetamine. Located on Christina Hoisington was a plastic bag containing a small amount of white powder which was ultimately tested using the Valtox system, and got a positive reaction for methamphetamine. Christina Hoisington was subsequently placed under arrest for possession of suspected methamphetamine. It should be noted at this time that while Christina Hoisington and your affiant were sitting in the market lot at Todd and Moorland Avenue prior to receiving the suspected methamphetamine from Gary Denno, Christina Hoisington pulled out a small plastic baggie containing a small amount of white powder. Christina Hoisington advised your affiant that she had been given this substance by "Sue" earlier in the day and was attempting to sell it.

It should be noted that during the entire transaction the blue pickup truck and the occupants, as well as your affiant and Christina Hoisington, were under constant surveillance by members of the Santa Rosa Police Department. From the time your affiant left the Burt Lane residence en route to the Langner residence with the pickup truck following and subsequently leaving the Langner residence and arriving to the Moorland Avenue residence, and subsequently the blue pickup truck leaving from the Moorland Avenue residence and arriving at the Gold Penny Inn in Rohnert Park and returning back to the market area at Moorland and Todd Road, that at no time was the pickup truck out of view of the surveillance units. The pickup truck made no further stops and stopped at no other locations. Also, while that pickup truck was at the Gold Penny Inn in Rohnert Park it made no contact with any other person while at that location.

Your affiant, through personal information, was aware that the residence at 3365 Moorland Avenue was reported to be affiliated with the Misfit Motorcycle Club. Your affiant also had personal information that Joseph Deshetres was a reported member of the Misfit Motorcycle Club. Your affiant then contacted Detective Mark Young of the Santa Rosa Police Department who had further information relating to the Misfit Motorcycle Club and to Joseph Deshetres, also known as "Misfit Joe."

On 3-16-87 your affiant contacted Detective Wayne Irey of the Sacramento County Sheriff's Office regarding the subject known as "Misfit Joe" and the Misfits Motorcycle Club. Your affiant is aware that Detective Irey is currently assigned to investigate outlaw motorcycle gangs, specifically the Misfit Motorcycle Club, and to identify and

apprehend fugitives related to those organizations. Detective Irey has been assigned to this detail for approximately five years. Detective Irey has also provided a sworn deposition to the Superior Court of Sacramento County pertaining to his expertise regarding the Misfit Motorcycle Club. Detective Irey has had contact with members of the Misfit Motorcycle Club almost on a weekly basis and is personally familiar with many members of the organization. Detective Irey stated that "Misfit Joe" is the street moniker for Joseph Henri Deshetres. Detective Irey stated that he personally knows Joseph Henry Deshetres to be a member of the Misfit Motorcycle Club. Detective Irey possesses a field identification card dated 1984 which shows the person positively identified as Joseph Henri Deshetres, listing his address as 3365 Moorland Avenue, Santa Rosa, California. Detective Irey advised that 3365 Moorland Avenue is the "Clubhouse" for the Santa Rosa Chapter of the Misfits Motorcycle Club. Detective Irey further stated that the Misfit Motorcycle Club is known to be an outlaw motorcycle gang signified by the 1% patch displayed on their vest and often displayed on their body. Detective Irey stated that from personal knowledge the 1% patch is worn by outlaw motorcycle gangs to identify themselves as being part of the 1% of all motorcycle clubs and riders that operate outside the law in a criminal manner.

On 3-16-87 your affiant spoke with Detective McMahon of the Santa Rosa Police Department who related the following. In the Spring of 1978 Detective McMahon and other members of the Santa Rosa Police Department served a search warrant on the premises of 3365 Moorland Avenue. Detective McMahon knew this residence to

be the clubhouse for the Misfit Motorcycle Club. The purpose of the search warrant was to recover weapons used in the commission of an assault with a deadly weapon. Upon entering, investigators located Joseph Henri Deshetres in one of the bedrooms in the residence. Deshetres was apprehended in the process of reaching for a loaded .38 caliber revolver lying on a night stand next to the bed. Investigators also seized a shotgun that was in the same room.

On 3-16-87 your affiant contacted Sergeant Laver and Detective Anderson of the Sonoma County Sheriff's Office who participated in a search of the residence at 3365 Moorland Avenue, Santa Rosa, approximately 1½ years ago. Sergeant Laver and Detective Anderson knew 3365 Moorland Avenue to be the clubhouse of the misfits. The purpose of the search was to attempt to locate and arrest a fugitive known as "K-Tom." While at the residence they had contact with Joseph Henri Deshetres. The individuals who were in the residence at the time of the search advised investigators that they were there conducting a meeting of the Santa Rosa Chapter of the Misfits Motorcycle Club. Detective Anderson further advised your affiant that while investigators were at the residence the investigators located Phenyl-2-Propanone, commonly known as P-2-P and methylamine. Your affiant knows these two substances to be part of the materials used to manufacture methamphetamine.

On 11-24-86, members of the Santa Rosa Police Department responded to 1028 Temple Avenue, Santa Rosa regarding a report of a robbery in progress. Officers located Joseph Henri Deshetres and others in the vicinity

of that address. Officers were told by victims and witnesses that a "biker by the name of Joe" (later identified as Joseph Henri Deshetres) had kicked in the back door of the residence. The assailants were armed with a loaded .380 caliber semi-automatic pistol which was later recovered at the scene. Upon arrival of the Police Department, Joseph Henri Deshetres spotted the arriving officers, grabbed a victim and attempted to leave the area. Joseph Henri Deshetres was taken into custody by the Santa Rosa Police Department. Joseph Henri Deshetres and his associates were arrested for assault with a deadly weapon and burglary. One of the victims identified Joseph Henri Desnetres as a member of the Misfit Motorcycle Club. The victim further stated that Deshetres and his associates would kill him if they learned that he had called the police. The victim declined cooperation with law enforcement officials based on the fear of retaliation against himself, his family and friends. Your affiant also has had personal knowledge that the victim in this incident is a reported dealer in methamphetamine (refer to Santa Rosa Police report #86-22886).

Your affiant has reviewed the arrest record of Deshetres and obtained the following information. On 3-3-73 Joseph Henri Deshetres was arrested by the Sacramento County Sheriff's Office for possession and sale of dangerous drugs. On 12-17-73 Joseph Henri Deshetres was arrested for possession of an illegal weapon. On 2-1-74 the Sacramento Police Department arrested Joseph Henri Deshetres for assault with a deadly weapon. On 8-27-84 the Sacramento Police Department arrested Joseph Henri Deshetres for interfering with a police officer. On 2-27-75 Joseph Henri Deshetres was arrested by the Roseville

Police Department and the Sacramento Police Department for receiving stolen property and possession of marijuana, possession of amphetamines and possession of an illegal weapon. On 4-25-76 Joseph Henri Deshetres was arrested by the Oroville Police Department for numerous charges including robbery and exhibiting a deadly weapon. On 7-10-76 Joseph Henri Deshetres was arrested by the Lake County Sheriff's Office for carrying a concealed weapon. On 6-1-77 Joseph Henri Deshetres was arrested by the Sonoma County Sheriff's Office for possession of stolen property and a felon with a hand gun. In May, 1982 the Jackson Police Department arrested Joseph Henri Deshetres for armed robbery.

Based on the facts set forth in this affidavit, your affiant requests permission to search the residence of 3365 Moorland Avenue for the above described property for the following reasons:

Based on your affiant's training and experience, your affiant is aware that methamphetamine is found in a powder form. While in that powder form methamphetamine is packaged in clear plastic baggies, paper envelopes, and paper bindles. Further, based on your affiant's training and experience, your affiant knows that methamphetamine is sold in quantities of weight. Your affiant knows that people who traffic in methamphetamine utilize scales and other weighing devices to accurately weigh and package quantities of methamphetamine for subsequent sale. Further, based on your affiant's training and expertise, your affiant is aware that methamphetamine is generally ingested into the body in one of two ways. Methamphetamine is ingested in its powder form by inhaling through the nose, or ingested

into the body within a liquid form by injecting into a vein with the use of a hypodermic syringe. Your affiant knows that when ingesting methamphetamine into the body by inhaling through the nose, the user will commonly use a hard flat surface such as a mirror and then form the methamphetamine into a long, straight thin line with the use of a razor blade. The user will then utilize a plastic straw and inhale the methamphetamine through the straw in the nose. Further, based on your affiant's experience, your affiant is aware that when the user injects the liquid form of methaphetamine, he will generally use a hypodermic syringe. The user will generally strain the liquid methaphetamine into the syringe through a wad of cotton in order to remove impurities.

Individuals who possess methamphetamine for the purpose of sale will keep U.S. currency, sellers lists, buyers lists and recordations of sales to document the trafficking of methamphetamine. This also includes personal telephone books, address books, and other paper documents that the individuals will keep to maintain records of purchasers and sellers of the methamphetamine. It is also your affiant's experience that the individuals involved in the trafficking of methamphetamine and other dangerous drugs will have co-conspirators who are normally required to facilitate the distribution of the illicit product.

Your affiant further requests permission to search for utility receipts, rent receipts and cancelled mail envelopes and keys as these items tend to show the identity of persons in control of the premises, storage areas and containers where narcotics or narcotic paraphernalia may be found.

Your affiant also requests permission to listen to, note and record any message left on any telephone answering machine inside the location, or answer any telephone calls received during the course of the search warrant being served, as the telephone is a common tool used by individuals involved in illegal narcotics trafficking to facilitate the distribution of the narcotics.

Your affiant requests the authority to seize as evidence any documents, clothing, photographs, and other forms of communication and/or advertisement which would tend to show membership in or sponsorship of the Misfit Motorcycle Club based on the following reasons:

Your affiant was informed that the source of the methamphetamines was "Misfit Joe." "Misfit Joe" has been identified as Joseph Henri Deshetres. Your affiant believes that Deshetres' source of methamphetamine is derived from his membership in, and associations with, the Misfits Motorcycle Club. Your affiant intends to establish that Deshetres' residence at 3365 Moorland Avenue is the current clubhouse of the Misfit Motorcycle Club. Your affiant believes that the seizure of the above items will tend to prove or establish ties between Deshetres and other Misfit Motorcycle Club members involved in the manufacture and distribution of methamphetamine. Seizure of the above described materials would tend to show the organization and association of various Misfit Motorcycle Club members to Deshetres.

STATEMENT OF PROBABLE CAUSE FOR ENDORSEMENT OF NIGHTTIME SERVICE

Based on Section 1533 of the Penal Code, your affiant requests that the search warrant be endorsed for nighttime service based on the following reasons: Your affiant spoke with Sergeant Mike Steen of the Santa Rosa Police Department. Sergeant Steen is the supervisor of the Santa Rosa Police Department Special Response Team. Sergeant Steen has expressed a desire to attempt service of the residence just shortly after daylight at approximately 6:00AM. Sergeant Steen advised that for officers and public safety, this would be the best time. Based on the violent history of Joseph Henri Deshetres, a service at dawn would heighten the chances that the individuals in the residence would be asleep and less likely to obtain weapons. Also, at that hour of the morning, there is very limited vehicle and pedestrian traffic in that area. For the above stated reasons your affiant respectively requests that the search warrant by endorsed for nighttime service.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH DESHETRES, Plaintiff, vs. LARRY WAYNE MAHRE, et al., Defendants.	NO. C 88 0875 DLJ NO. C 88 0874 DLJ Date: March 1, 1989 Time: 10 a.m. DECLARATION OF BENEDICT J. TISA IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
JERI LYNN THOMPSON, individually and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor, Plaintiffs, vs. LARRY WAYNE MAHRE, et al., Defendants.	

I, BENEDICT J. TISA, Declare that:

1. I have personal knowledge of the facts stated herein and if called as a witness can and will competently testify to them under oath.

2. I have been employed by the United States Government as an F.B.I. Agent since 1972. During my employment with the F.B.I. I have been given a number of investigative assignments including narcotics investigations, undercover work, bank fraud investigations, bank robberies, foreign counter-intelligence, counter-terrorism and fugitive investigations.

3. Prior to joining the F.B.I. I served in the U.S. Marine Corps as an infantry officer for four years. I completed one year of duty in Vietnam and gained combat experience in tactics, weapons and planning small unit operations.

4. For the past sixteen years I have taught special operations tactics for the F.B.I. I have trained federal, state and military S.W.A.T. teams and operation commanders in tactics, firearms, planning, command and control procedure. The special weapons and tactics training which I conduct each year consists of six to seven forty hour basic S.W.A.T. classes and two sixteen hour advanced S.W.A.T. classes. I also teach a forty hour tactical commander course, which consists of operational management and execution procedure for high risk situations. In the basic F.B.I. S.W.A.T. training course and advanced F.B.I. S.W.A.T. course, I have trained the various members of the Santa Rosa Police Department who have taken our courses.

5. For the past five years I have been in charge of the thirty agent F.B.I. Special Operations Team, which performs the special weapons and tactics function for the F.B.I., including service of search warrants and arrest warrants.

6. As part of the basic S.W.A.T. course and advanced S.W.A.T. course, which I teach, I include the tactical considerations for service of warrants on premises in which armed resistance is a possibility. One important consideration is the timing of the warrant service, with the most frequently designated time being during the early morning hours, just at/prior to dawn. In my experience, this is a common law enforcement practice. This allows the entry team to be assembled and positioned under cover of darkness without being seen by the occupants of the premises. This is desirable in order to minimize the compromise of the entry team during the approach and execution of breaching procedure. This tactic preserves the element of surprise and reduces the chance of the occupants getting access to weapons or barricading the premises. Another factor favoring early morning service of a warrant is that there is a higher probability that the occupants of the premises will be asleep and will not arm themselves and attack the police officers. A further consideration is that there are likely to be fewer pedestrians and vehicles on the street outside in the early morning hours who would be endangered by any violent confrontation. Another consideration in favor of early morning warrant service is the preservation of evidence. Catching the occupants of the residence asleep reduces the likelihood of the destruction of evidence, ie, that they will dispose of narcotics by flushing them down

the toilet or throwing them out of a window prior to the service of the warrant.

7. In the S.W.A.T. courses which I teach, the conditions for rapid entry into the premises when executing warrants are emphasized. At the point of entry, the police officers are concentrating at a single location and have no control over the occupants of the house. It is in most situations, wherein S.W.A.T. teams are utilized, essential that they enter the premises swiftly and deploy as rapidly as possible throughout the interior of the house in order to minimize the chance that the occupants will arm themselves and endanger the lives of the officers. A delay of ten seconds, after the knock notice prior to entry, would in many situations be considered too long in that it would unnecessarily increase the risk factor for the officers. In such situations the officers will also enter as quickly as possible to gain control of the structure and occupants to minimize the possibility of an armed suspect escaping from the premises and running out into the neighborhood. A common F.B.I. technique which I teach is the use of a diversion and/or distraction such as the setting off of a flash/bang device or the breaking of a window in an area removed from the point of entry in order to confuse and distract the occupants of the house.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on 10 Dec. 89, 1989.

/s/ Benedict J. Tisa
BENEDICT J. TISA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH DESHETRES, Plaintiff, vs. LARRY WAYNE MAHRE, et al., Defendants.	NO. C 88 0875 DLJ NO. C 88 0874 DLJ Date: March 1, 1989 Time: 10 a.m. DECLARATION OF MICHAEL STEEN IN SUPPORT OF DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT
JERI LYNN THOMPSON, individually and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor, Plaintiffs, vs. LARRY WAYNE MAHRE, et.al., Defendants.	

I, MICHAEL STEEN, declare that:

1. I have personal knowledge of the facts stated herein and, if called as a witness, can and will competently testify to them under oath.

2. I have been employed as a peace officer for sixteen and a half years. I served in the Oakland Police Department for seven and a half years, four and a half years as a patrolman, and three years as a sergeant. I have been employed by the Santa Rosa Police Department for nine years and have held the rank of Sergeant for eight years. For the past five years I have been supervisor of the special response team. I have completed the basic F.B.I. 45-hour SWAT training and four annual 24-hour advanced courses also taught by the F.B.I.

3. One of the functions of the special response team is to serve warrants on premises in which there believed to be individuals who are armed or have a history of violence.

4. In special response team operations training which I have received from the Federal Bureau of Investigation, I have been taught that service of a search warrant on an armed or violent individual is best effected at daybreak. At this time of day there is a greater likelihood that the occupants of the premises will be asleep and will not be able to obtain weapons prior to entry by police officers. In addition, there is less vehicular and pedestrian traffic on the street and thus less likelihood that a bystander will be injured.

5. Within a day or two prior to March 17, 1987, Detective Larry Mahre contacted me and requested my

opinion as to the appropriate time for serving a search warrant on the Misfits clubhouse at 3365 Moorland Avenue. Based on my knowledge of the Misfits' reputation for violence, and based upon the specific information which Detective Mahre gave to me indicating the violent propensities of Misfit Joe who was believed to be the occupant of the premises, I requested that the search warrant be endorsed for night service so that entry to the premises might be made at daybreak.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Santa Rosa, California on January 26, 198(9

Michael T. Steen
MICHAEL STEEN

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH DESHETRES,

Plaintiff,

vs.

LARRY WAYNE MAHRE, et al.,

Defendants.

JERI LYNN THOMPSON, individually and as Guardian ad Litem for NICOLE LEAH THOMPSON, a minor,

Plaintiffs,

vs.

LARRY WAYNE MAHRE, et al.,

Defendants.

NO. C 88 0875 DLJ

NO. C 88 0874 DLJ

Date: March 1, 1989
Time: 10 a.m.

SECOND DECLARATION OF MICHAEL STEEN IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I, MICHAEL STEEN, declare that:

1. I have personal knowledge of the facts stated herein and if called as a witness, can and will competently testify to them under oath.

2. I have previously made a declaration in this case which is attached as an exhibit to the Motion for Partial Summary Judgment by defendants previously filed.

3. In my prior declaration I have set forth my experience and training as a police officer.

4. On March 17, 1987 I was assigned by the Santa Rosa Police Department as the supervisor in charge of crimes against property. I was also assigned as one of the two supervisors in charge of the special response teams. It is the function of the special response teams to go into high risk situations for the purpose of serving a search warrant or effectuating an arrest. The teams are also used in hostage and barricaded suspect situations. On March 17, 1987 I was assigned to lead the special response team which served the search warrant on 3365 Moorland Avenue.

5. I and also all of the officers who are assigned to the Santa Rosa Police Department special response team have gone through the forty-hour basic SWAT course taught by the F.B.I. In addition to that, we attend approximately three days a year of advanced SWAT training, which is also given by the F.B.I., although not all officers attend every year. We also have in-house special response team training once a month for eight hours.

6. In preparing for service of the warrant, I first drew up an operations order, a copy of which is attached

to this declaration as Exhibit A. As indicated in that order, I requested the assignment of eighteen officers to assist in gaining entry to the premises and serving the warrant. Normally ten officers would be assigned to a special response team, but I felt because of the possibility for a violent confrontation with the Misfit Motorcycle Gang that the assignment of an additional eight officers was necessary.

7. Based on intelligence which I had obtained within the Santa Rosa Police Department, I believed that a special response team would encounter Joseph Henri Deshetres when serving the search warrant. My information was that Mr. Deshetres was violent and had a past history of involvement with weapons and narcotics. I also knew that in 1978 Mr. Deshetres was apprehended by a member of the Santa Rosa Police Department while Mr. Deshetres was reaching for a handgun. I also believed that we might encounter another member of the Misfit Motorcycle Gang, Daryl Bouzer, who had a history of sales and manufacture of methamphetamine.

8. Prior to the morning of March 16, 1987 I drove to 3365 Moorland Avenue several times for the purpose of conducting surveillance in order to prepare for service of the warrant. I observed a number of vehicles on the side of the residence and from the number of vehicles, formed the opinion that there might be as many as ten occupants of the house. I was aware of the reputation of the Misfit Motorcycle Gang for the distribution of methamphetamine in Sonoma County and also for acts of violence. I was also aware of an individual named Rex Flowers who was an associate of the Misfits and had knowledge of the use of explosives.

9. In order to be prepared in case of a violent confrontation or the possible explosion of a methamphetamine laboratory, I arranged to have a fire truck and an ambulance stand by at the time the warrant was served.

10. As stated in my previous declaration, I determined that service of the warrant at daybreak would minimize the likelihood of a violent confrontation with members of the Misfits. This would reduce the likelihood of injury to a police officer or to any casual passerby in the neighborhood.

11. At five o'clock on the morning of March 17, 1987 I met with the members of my special response team, members of the narcotics unit, Wayne Irey of the Sacramento Sheriff's office who was an expert on the Misfit Motorcycle Gang, an officer from the Clearlake Police Department who had brought a narcotics dog, a deputy from the Sonoma County Sheriff's office who was to provide traffic control, and four uniformed officers from the Santa Rosa Police Department who were also to provide traffic control. During the briefing session we reviewed the operations order which I had prepared.

12. Subjects that were emphasized during the briefing were the dangers of a chemical explosion if a methamphetamine lab was found on the premises, the possibility of an armed confrontation with members of the Misfits, and the fact that the Misfits were known to utilize police radio scanners which would pose danger of compromising the element of surprise which we were seeking to maintain. We also reviewed the fact that members of the group were known to have knowledge of

explosives and possibly booby traps might be found on the premises.

13. As part of the plan for entering the premises, I instructed one of my officers to position himself by what we believed to be the rear bedroom window of the main house. He was instructed that after he heard the original knock notice being given at the front door he was to wait approximately twenty seconds and then break the bedroom window. It was my belief that this would distract anyone who was in the rear bedroom and take their attention away from our point of entry.

14. The members of the SWAT team were dressed in high visibility blue uniforms and a blue baseball type hat embossed with Santa Rosa Police Department insignia. The officers wore a large cloth badge sewn to the left shirt pocket area or their regular metal badges. They also wore police patches on each shoulder. The purpose of these high visibility uniforms is to clearly identify the officers as police officers when they are entering the building and confronting suspects.

15. At approximately six a.m. we drove to 3365 Moorland Avenue. As we approached the premises from the north, I saw a white pickup truck begin to pull out into the street from the driveway near that address. I could not see the driver of the truck, but did see the truck enter the street and then move back into the driveway. When we got close to the premises I saw the white truck pull again into the street and this time the driver of the truck looked directly at the police vehicles coming down the street. The driver of the white pickup truck then backed into the driveway at 3365 Moorland Avenue and I

could see him leave the truck and walk rapidly toward the back of the house. I noticed that he had left the door of the truck open, and I became concerned that our attempt to surprise the occupants of the house had been compromised. I instructed the officers on the special response team to get to the front door of the house as quickly as possible. On my way by the white pickup truck I noticed that the engine had been left running and the radio was still playing inside the truck.

16. Because of my concern for the safety of the officers at this point I initially determined to dispense with the knock notice and enter the house immediately. However, by the time I arrived at the front doorstep the lead officer was already giving the knock notice. I heard the lead officer shout in a loud voice, "Santa Rosa police, we have a search warrant," or words to that effect. He repeated this once and I positioned the men behind him to go into the house. A period of about seven to ten seconds elapsed and then I ordered a second officer equipped with a battering ram to knock the door down. He attempted to do this by first hitting the locked side of the door, but when this did not give way he then attempted to open the door on the hinged side and eventually succeeded. This process took approximately thirty more seconds. Later I determined that the front door had been nailed shut with a large screwdriver.

17. As we entered the house, one of the officers again yelled, "Santa Rosa police, we have a warrant," or words to that effect. I was the fifth man into the house. In the first room were two Harley chopper motorcycles and a variety of motorcycle and auto parts and furniture which made it somewhat difficult to get through that

room. We were channeled into a narrow portion of the room in order to get into the next room. As I entered the next room, shooting broke out between the officers and a person whom I later learned to be Joseph Deshetres. At that time the lead officer, Ed Hemphill, was wounded and I ordered the officers in the room ahead of me to pull officer Hemphill out of the house. Once we had gotten back outside the house, one of the officers positioned alongside of the house informed me that he had a suspect at gunpoint inside a bathroom. A second officer informed me that there was a woman and a baby in a bedroom area. I went to the bedroom first and assisted the officer in removing the woman and the child from the bedroom. I then returned to the area outside of the bathroom and we removed Mr. Deshetres, who had been wounded. At that point I reorganized the team and we re-entered the house for the purpose of securing it. We encountered no one else in the house. However, when we attempted to get into the rear bedroom we encountered a dog. The dog was positioned in the doorway to the bedroom and was growling at us. I was concerned that there might be another suspect in this room because when we had removed the woman and child from the same room earlier, I was informed by another officer that the woman had occasionally glanced toward the closet area, but had told the officer that no one else was in the room. Initially, we tried to get around the dog into the room, but the dog was snapping at us and barking and I became concerned that we might be distracted by the dog as we entered the room. For this reason I instructed the officer who was ahead of me to shoot the dog. He did that and we searched the room and found no one in the room.

18. While in the house during our second entry, I observed a handgun laying on the floor in the immediate vicinity of where Mr. Deshetres had been shot.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Rosa, California on February 7, 1989.

/s/ Michael Steen
MICHAEL STEEN

EXHIBIT A

March 17, 1987

OPERATIONS ORDER

I Situation

A) Suspects – see attached

B) Location – 3365 Moorland/Photo

C) Weapons – unknown could expect assortment of semiautomatic handguns and possible explosives

D) Assisting Agency

1) S.O. – Narcotics

2) Sacramento S.O. – motorcycle gang expert

3) Clearlake P.D. – Narcotics dog

4) Fire Dept Standby – Hazmat

5) Ambulance Standby

E) Non Participating Agency notification

* Contact S.O. Communications

II Mission – Execution Search Warrant/Detain Occupants.

III Execution – (Isolate, Contain, Search)

A) Establish Perimeters – See attached Position Map C through G

B) Position Assault Team – See attached Position Map A and B

C) Position S.O. Rear Guard (Position H)

D) Block Off Street (Position I & J)

E) Knock Notice/Entry

F) Entry Plan – See attached

G) Time Schedules

0500-0545 Briefing

0545-1610 Travel to rendevous [sic] and regroup

0615- Travel to objective and assault

H) Danger Areas

Position A – initial entry

Position B – concealment

Position D – 2 man search

Position E – escape route

I) Rendevous [sic] Location – WILJAN CT. (See Map)

J) Rehersal [sic] /Inspection staging area

K) Post Operations

1) Gorman Hargrove Nunes and Crank Security during search

2) SRT debriefing at station

L) Order of Movement – SRT, Marked Units, Narcotics, Support

IV EQUIPMENT

A) Weapons

1) All Standard Side Arms

2) Special Weapons

a) H & K – Hayes

b) Shotgun

1) Kelsall

2) Reynolds

3) Schwedhelm (Swearingen)

4) Gorman

c) M-16 + Extra Rounds

1) Swearingen

2) Crank

3) Ferret Rounds 12 GA

a) Reynolds

b) Gorman

B) Small SRT Radios – Reynolds in charge give out at staging area

1) Steen

2) Reynolds

3) Swearingen
4) Noble

C) Portables
1) Covington
2) Steen
3) Higginbotham
4) Hargrove
5) Nunes
6) Albritton
7) Kelsall
8) Swearingen

D) Gas Masks All (plus extras)

E) Battering Ram – Covington

F) Small Mirrors – Covington/Brodd

G) Flashlights (Mandatory)
1) Hemphill
2) Steen
3) Briggs
4) Nunes

H) Team Box

I) Gas Box

J) Vests All

V Administration

A) Special Duties
1) Battering Ram – Hemphill/Covington

2) H & K – Hayes

3) Gas Deployment – Reynolds/Gorman

4) Diversion – Reynolds

5) Bathroom Window Albritton

6) Search Warrant/Knock Notice Hemphill

B) Assault Team Responsibilities. See Attached

C) Perimeter Responsibilities. See Position Map

D) Handling Injured – Remove, to closest covered position Sgt. Swearingen to request medical aid.

E) Suspects – all detained persons will be handcuffed and moved to Living Room area as soon as possible.

V [sic] Control Communications

A) SRT Overall Responsibility

Assault – Steen

Perimeter – Swearingen

B) Search/Seizure Prisoner Handling – Sgt Knobelauch

C) Communications

1) SRT Radios Channel 1

2) P.D. Radios Channel 3

3) Call Signs

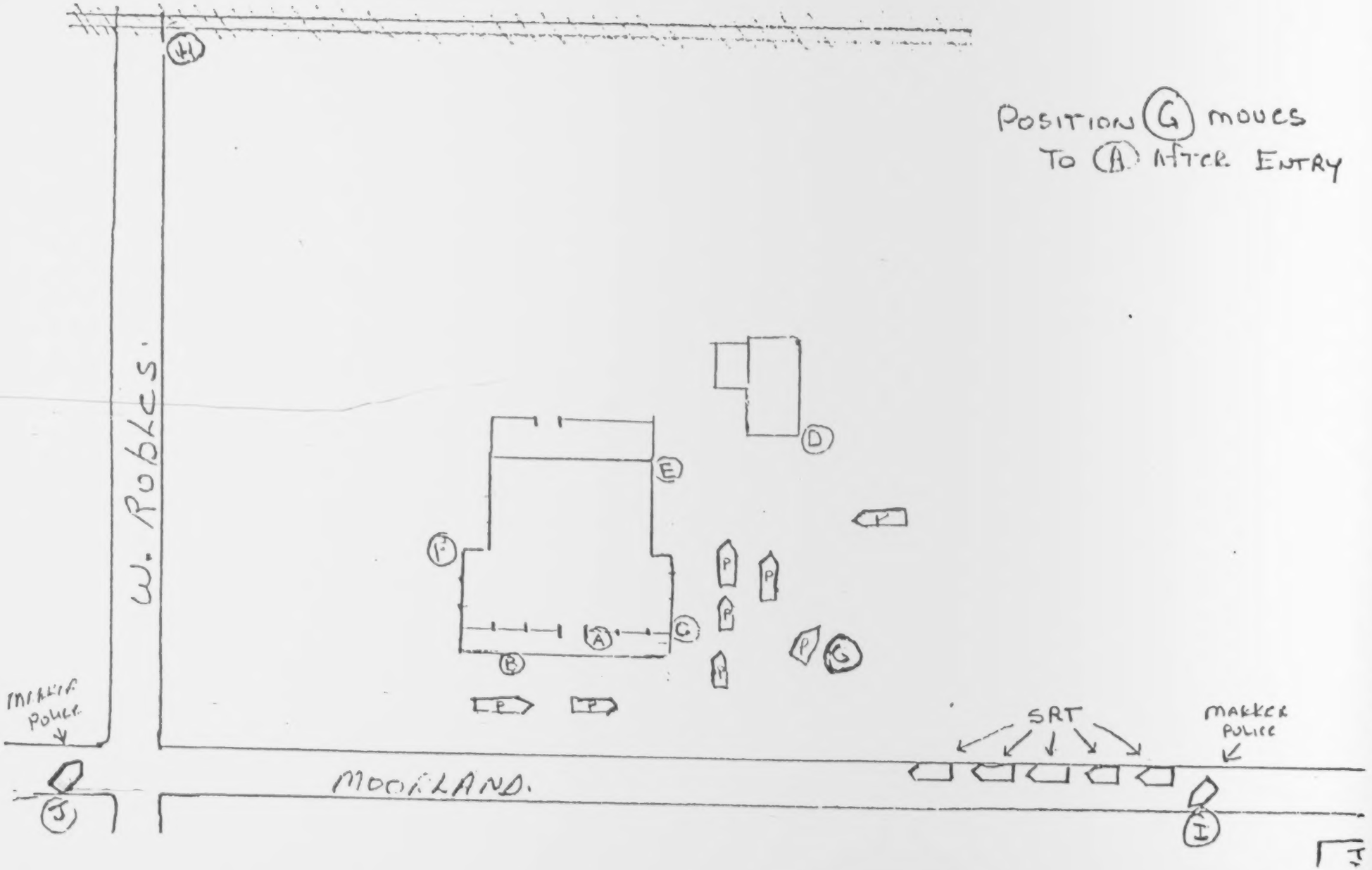
A) Sam 8 – Steen

B) Sam 12 – Knobelauch

– Positions use position design

4) Prearranged SRT hand signals

POSITION MAP



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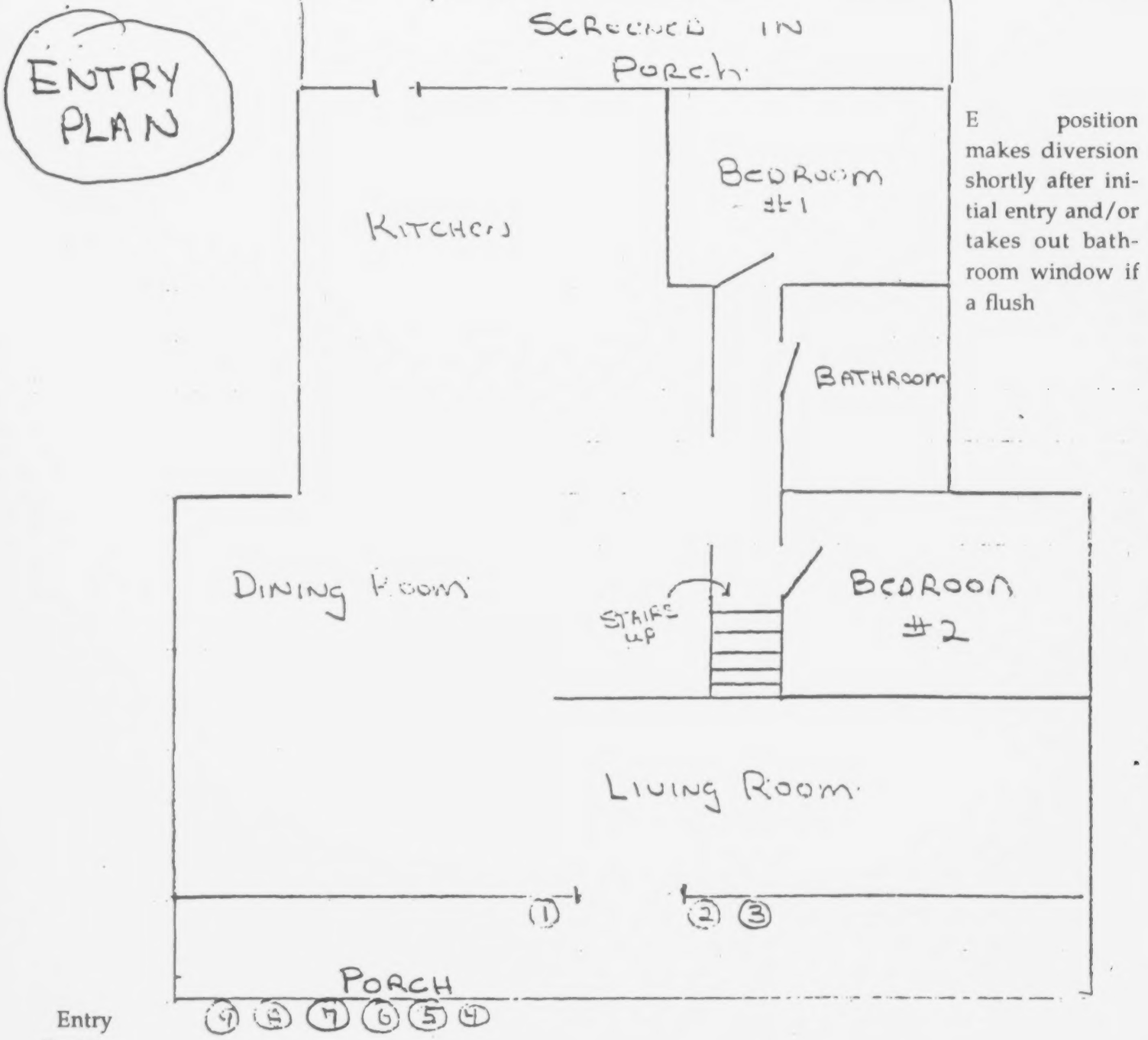

E position makes diversion shortly after initial entry and/or takes out bathroom window if a flush

Entry Position			
1	2	Hemphill/Covington	Knock Notice/Entry (RAM) Clear Livingroom Dining Kitchen move to Bathroom & Bedroom
3	4	Hayes/Brudd	Move to Bedroom 2 cover Stairwell Assist Upstairs
6	7	Senkir/Noble	Upstairs Bathrooms
8	9	Briggs/Higginbotham	Prisoner Security/Overall Assist
	5	STEEN	Cover/Direct/Assist

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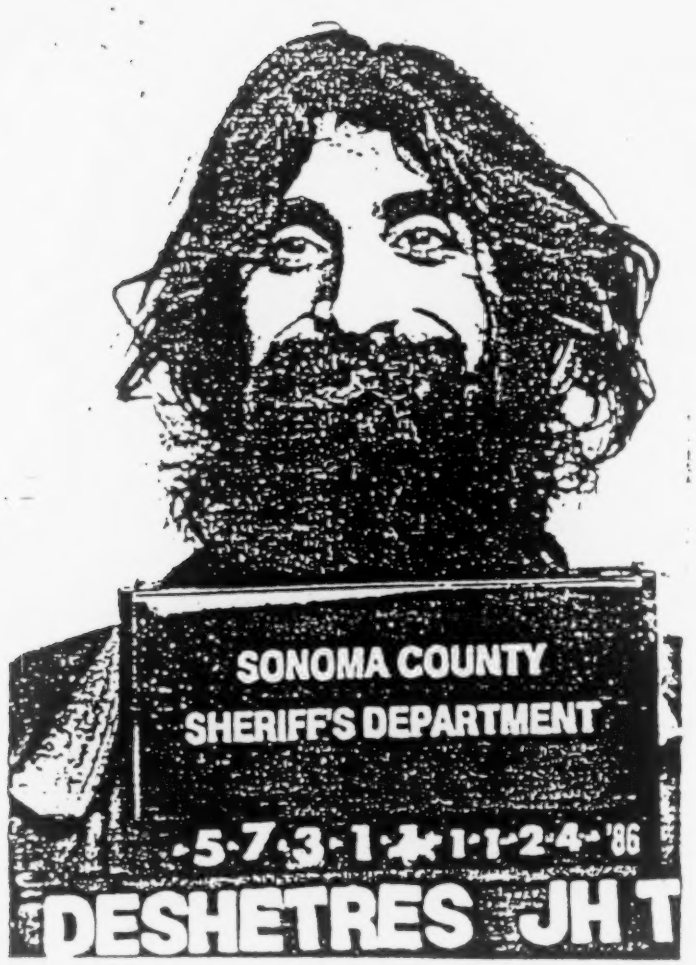
POSITION AND VEHICLE ASSIGNMENT

Position	Assigned	VEH
A	Hemphill Covington Hayes	206
B	Brodd, Steen, Senkir, Noble, Briggs, Higginbotham	17095
C	Gorman Hargrove	207
D	Nunes, Crank	207
E	Reynolds, Albritton	205
F	Kelsall, McMahon	205
G	Swearingen Schwedhelm	203
H	S.O. Marked Unit	
I	Marked SRPD	
J	Marked SRPD	

* If your name is underlined you are driver and responsible to insure you have right people



Susp #1

Deshetres, Joseph Henry
WM 39, 5-10, 150
BRO, BRO 8/31/47

AKA Misfit Joe
Joe Snidley
Extremely Violent – Past History

Weapons/Narcotics 1978
Aprehended [sic] while reaching for weapon

CALIFORNIA DEPARTMENT OF MOTOR VEHICLE
FOR DMV OR LAW ENFORCEMENT USE ONLY

DRIVER LICENSE
•2033730•
•Daryl Maurice Bouzer
•1078 South Wright
•Santa Rosa CA 95401

SEX	HAIR	EYES	HEIGHT	WEIGHT	DATE OF B
M	Brn	Brn	6-01	220	10-0

PRE LIC EXP
MUST WEAR CORRECTIVE LENSES
82
OTHER ADDRESS
SEE OVER FOR ANY OTHER CONDITION
CLASS
SECTION 12804 VEHICLE CODE
x Daryl M Bouzer
10-28-82 STR-sb

Susp #2

Bouzer, Daryl

AKA
Roach
San John Vincent
James Patrick Bommetta
James Patrick Bonnetta
Maurice Daryl Bouzer
James Penetta
Extensive History Sales and Manufacture of Methamphetamine

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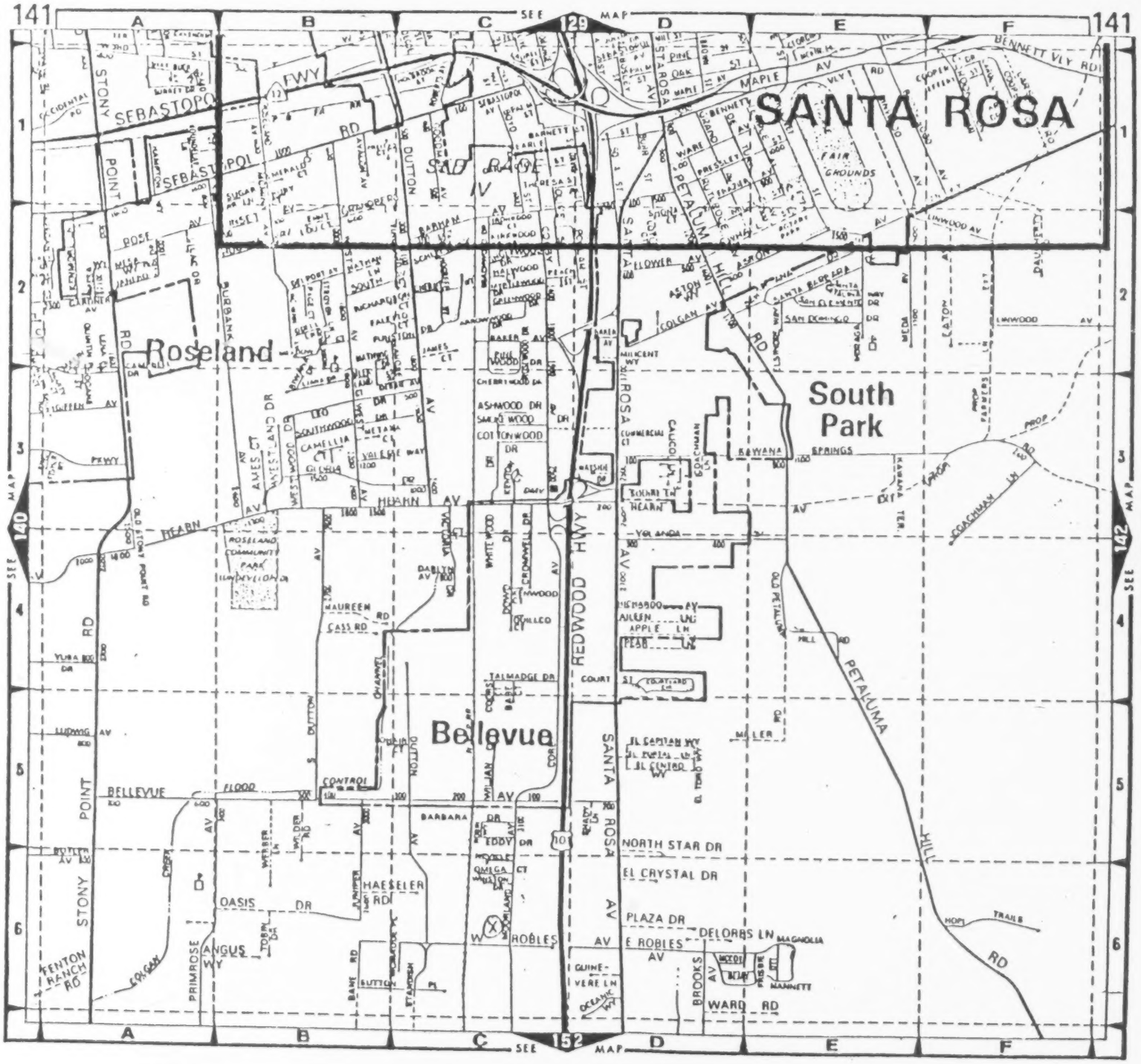

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